(1)

No. 91-1393-CFH
Status: GRANTED

Title: A. L. Lockhart, Director, Arkansas Department of Correction, Petitioner
v.
Bobby Ray Fretwell

Docketed:
March 2, 1992

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Miller,Clint

Counsel for respondent: Medlock,Richard

Entry	Date	Note	Proceedings and Orders
1	Mar 2 1992	G	Petition for writ of certiorari filed.
3	Mar 20 1992		Order extending time to file response to petition until April 28, 1992.
4	Apr 24 1992		Brief of respondent Bobby Fretwell in opposition filed.
5	Apr 24 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Apr 29 1992		DISTRIBUTED. May 15, 1992
7	May 18 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	May 18 1992		Petition GRANTED.
			**********
12	Jun 4 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals, Eighth Circuit.
9	Jun 8 1992	G	Motion of respondent for appointment of counsel filed.
10	Jun 8 1992		DISTRIBUTED. June 12, 1992
11	Jun 10 1992		Record filed.
		*	Original proceedings U.S.District Court, Eastern District of Arkansas. (1 Box)
13	Jun 15 1992		Motion for appointment of counsel GRANTED and it is ordered that Ricky B. Medlock, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the respondent in this case.
15	Jun 17 1992		Order extending time to file brief of petitioner on the merits until July 24, 1992.
16	Jul 22 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jul 23 1992		Brief amicus curiae of Criminal Legal Foundation filed.
17	Jul 24 1992		Brief amicus curiae of United States filed.
18	Jul 24 1992		Joint appendix filed.
19	Jul 24 1992		Brief of petitioner A.L. Lockhart, Director filed.
21	Jul 24 1992		Brief amici curiae of California, et al. filed.
22	Jul 30 1992	G	Application (A92-84) by Petitioner to file a leave to file brief on the merits in excess of page limits, submitted to Justice Blackmun.
23	Jul 31 1992		Application (A92-84) granted by Justice Blackmun, allowing a maximum of 59 pages.
25	Aug 3 1992		Order extending time to file brief of respondent on the merits until September 18, 1992.
26	Aug 21 1992		SET FOR ARGUMENT TUESDAY, NOVEMBER 3, 1992. (3RD CASE).

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No. 91-1393-CFH

Entry	Date	Note	Proceedings and Orders
27	Sep 4 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
28	Sep 18 1992		Brief amici curiae of Capital Collateral Representative of Florida, et al. filed.
29	Sep 18 1992		Brief of respondent Bobby Ray Fretwell filed.
30	Oct 8 1992		CIRCULATED.
31	Oct 20 1992	X	Reply brief of petitioner filed.
32	Nov 3 1992		ARGUED.

91-1393

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

A.L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION
PETITIONER

VS.

BOBBY RAY FRETWELL
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WINSTON BRYANT
Arkansas Attorney General

BY: CLINT MILLER, ESQ.
Senior Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-3657

Counsel For
Petitioner

QUESTION PRESENTED

WHETHER THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT FRETWELL WAS DENIED HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL FELONY MURDER TRIAL IN THAT HE SUFFERED PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE A "DOUBLE-COUNTING" OBJECTION, BASED ON THE EIGHTH CIRCUIT'S HOLDING IN *COLLINS V. LOCKHART,* 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN IN LIGHT OF THE FACT THAT *COLLINS* HAD BEEN DECIDED CONTRARY TO THE JOINT OPINION OF THIS COURT IN *JUREK V. TEXAS*, 428 U.S. 262 (1976).

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In the
Supreme Court of the United States

No. ____

A.L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION
PETITIONER

vs.

BOBBY RAY FRETWELL
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, Director, Arkansas Department of Correction, the petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of appeals is reported as *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), and is reprinted in the appendix to this petition. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990), and is reprinted in the appendix to this petition. The appendix also includes the Eighth Circuit's order denying petitioner Lockhart's petition for rehearing and suggestion for rehearing *en banc*, that was issued on December 4, 1991. The appendix also includes the Eighth Circuit's order recalling the mandate in the instant case, which was issued on December 30, 1991.

JURISDICTION

The Eighth Circuit Court of Appeals handed down its opinion in the instant case on September 23, 1991. This decision was rendered by a three-judge panel of the court. Petitioner Lockhart petitioned for rehearing and for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing and petition for rehearing *en banc*. Five judges for the Eighth Circuit Court of Appeals, Judges Fagg, Bowman, Wollman, Beam and Loken, voted to grant petitioner Fretwell's petition for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing and petition for rehearing *en banc* on December 4, 1991.

This Court has jurisdiction to review the instant case by writ of certiorari. This Court's jurisdiction to review the instant case by means of the writ of certiorari is set forth in 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "...[A]nd to have the assistance of counsel for his defense...."

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "...[N]or shall any state deprive any person of life, liberty, or property, without due process of law;...."

STATEMENT OF THE CASE

This is a petition for writ of certiorari, brought by petitioner A. L. Lockhart, Director, Arkansas Department of Correction, in which he asks this Court to review the decision of the United States Eighth Circuit Court of Appeals in the case of *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). In *Fretwell v. Lockhart*, the Eighth Circuit Court of Appeals had affirmed a judgment entered by the United States District Court for the Eastern District of Arkansas, pursuant to 28 U.S.C. § 2254, conditionally granting habeas corpus relief to respondent Bobby Ray Fretwell, a prisoner held on Death Row at the Tucker Unit of the Arkansas Department of Correction. The District Court below vacated Fretwell's death sentence and conditioned reduction of Fretwell's sentence to life imprisonment without the possibility of parole on whether the State of Arkansas would agree to resentence Fretwell. (Such a "retrial" of only the penalty phase of a capital murder trial is permissible in Arkansas. *See* Ark. Code Ann. § 5-4-616 (1987)). Both petitioner Lockhart and respondent Fretwell appealed the judgment of the United States District Court for the Eastern District of Arkansas to the United States Eighth Circuit Court of Appeals.

On September 23, 1991, a three-judge panel of the Eighth Circuit Court of Appeals handed down a decision affirming the judgment of the United States District Court for the Eastern District of Arkansas. The Eighth Circuit's opinion is published as *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). In its opinion, the Eighth Circuit Court of Appeals concluded that the relief that Fretwell was entitled to was not a "retrial" of the penalty phase of his capital felony murder trial, but prohibition of such a "retrial" and reduction of his death sentence to life imprisonment without possibility of parole. Petitioner Lockhart petitioned for rehearing and petitioned the *banc* of the Eighth Circuit for rehearing. The *banc* of the court denied rehearing by a vote of five to five. After the *banc* of the Eighth Circuit Court of Appeals denied rehearing, petitioner Lockhart filed the

instant petition for writ of certiorari with this Court to review the decision of the Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*.

In August of 1985, Fretwell was tried on a charge of capital felony murder in Searcy County Circuit Court. In a trial bifurcated into a guilt/innocence phase and a penalty phase, a jury found Fretwell guilty of capital felony murder, as set forth in Ark. Stat. Ann. § 41-1501(1)(a) (Repl. 1977) (presently codified as Ark. Code Ann. § 5-10-101(a)(1) (1987)). The Searcy County jury found that Fretwell had murdered a man named Sherman Sullins in the course of committing robbery. (The particulars of Fretwell's murder of Sherman Sullins are set forth in detail by the United States District Court for the Eastern District of Arkansas in *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1335 (E.D. Ark. 1990), which is reprinted in the appendix of the instant petition). After the separate penalty phase of Fretwell's trial, the jury sentenced him to death. The state trial court, the Searcy County Circuit Court, had instructed the jury on two aggravating circumstances, "murder committed for the purpose of avoiding or preventing an arrest" and "murder committed for pecuniary gain."[1] The jury found only "murder committed for pecuniary gain" as an aggravating circumstance. Fretwell's trial counsel had failed to object to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain" despite the fact that just over six months earlier, on January 31, 1985, the United States Eighth Circuit Court of Appeals had handed down *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). In *Collins* the Eighth Circuit Court of Appeals had held that the Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment prohibits the use of "pecuniary gain" as an aggravating circumstance in capital felony murder trials where robbery-murder is the capital offense at issue.

[1]The "avoiding or preventing an arrest" aggravating circumstance is presently codified as Ark. Code Ann. § 5-4-604(5) (1987). The "pecuniary gain" aggravating circumstance is presently codified as Ark. Code Ann. § 5-4-604(6) (1987).

Fretwell directly appealed his conviction and death sentence to the Arkansas Supreme Court. The Arkansas Supreme Court affirmed in *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Subsequently, Fretwell petitioned the Arkansas Supreme Court for permission to seek post-conviction relief in Searcy County Circuit Court. Fretwell filed this petition pursuant to Arkansas Rule of Criminal Procedure 37.2(a). The Arkansas Supreme Court denied Fretwell's petition requesting permission to seek post-conviction relief in *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987). Subsequently, Fretwell attacked the validity of his capital felony murder conviction and death sentence by filing a petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2254 with the United States District Court for the Eastern District of Arkansas. The results of Fretwell's habeas corpus petition to the District Court for the Eastern District of Arkansas and the resulting appeal to the United States Eighth Circuit Court of Appeals have been noted above.

In deciding the instant case, the United States Eighth Circuit Court of Appeals concluded that Fretwell had suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial. Specifically, the Eighth Circuit determined that Fretwell's trial counsel was ineffective in that he failed to make a particular objection. The Eighth Circuit concluded that Fretwell's trial counsel was ineffective because he had failed to object at the penalty phase of Fretwell's capital murder trial to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain." According to the Eighth Circuit's analysis, Fretwell's trial counsel should have objected to the submission of this aggravating circumstance on the basis of the Eighth Circuit's prior decision in

Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

Collins held that the Fourteenth and Eighth Amendments' prohibition against cruel and unusual punishment prohibits a state from the use of pecuniary gain as an aggravating circumstance in capital felony murder cases where the predicate felony for the murder charge is robbery. According to the Eighth Circuit in *Collins*, the Eighth Amendment prohibits the use of pecuniary gain as an aggravating circumstance in robbery-murder capital felony murder trials because pecuniary gain duplicates an element of robbery and, therefore, does not genuinely narrow the class of robbery-murderers into a subclass of robbery-murderers that truly deserves the penalty of death. According to the Eighth Circuit in the instant case, had Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain," the state trial court would have followed the rationale of *Collins v. Lockhart* and not permitted the submission of the aggravating circumstance to the jury. According to the Eighth Circuit, had the state trial court not submitted to the jury the aggravating circumstance of "murder committed for pecuniary gain," the jury would have acquitted Fretwell of the death penalty. Although the Eighth Circuit does not say so in so many words, apparently it reached this conclusion because, as a matter of what *did* happen at Fretwell's trial, the jury did not find the other aggravating circumstance that had been submitted to it.

Also, the Eighth Circuit concluded that the only relief permitted by the writ of habeas corpus that would remedy Fretwell's deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial was prohibition of any effort by the State of Arkansas to retry the penalty phase of Fretwell's capital felony murder case and reduction of his death sentence to the only other alternative sentence, that being life imprisonment

without possibility of parole. It is the decision by the United States Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*, *supra* that Fretwell was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial that petitioner Lockhart is asking this Court to review by means of the writ of certiorari.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE LOWER COURTS NEED GUIDANCE CONCERNING THE MANNER IN WHICH CLAIMS OF PREJUDICE RESULTING FROM INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN DEATH PENALTY CASES ARE TO BE EVALUATED WHEN THE ALLEGED PREJUDICE ARISES FROM FAILURE TO MAKE AN OBJECTION ON THE BASIS OF PERSUASIVE CASE AUTHORITY THAT WAS SUBSEQUENTLY OVERRULED.

This case gives this Court the opportunity to provide guidance to lower courts reviewing criminal cases where the death penalty is imposed when the defendant argues that he suffered from prejudice because of trial counsel's failure to make an objection on the basis of persuasive case authority that was subsequently overruled. In these types of ineffective assistance of counsel cases three principles of constitional law collide. These three principles are: (1) the Eighth Amendment's requirement that death sentences not be imposed in a manner that is arbitrary and capricious; (2) the Sixth Amendment principle, set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), that a defendant's claim of prejudice owing to ineffective assistance of counsel is not to turn on "...the luck of a lawless decisionmaker."; and (3) this Court's practice of applying fully retroactively decisions in criminal or habeas corpus cases that reject claims of deprivation of rights guaranteed by the United States Constitution. Petitioner Lockhart respectfully submits that this is a complex area of Sixth Amendment ineffective assistance of counsel jurisprudence that this Court has never before addressed and that lower courts will be in need of guidance in this difficult area of the law -- particularly so given this Court's recent overruling of precedents where the overruling decision has the effect of rejecting claims in death penalty cases of deprivation of rights guaranteed by the Eighth and Fourteenth Amendments to the United States

Constitution. *See, e.g., Payne v. Tennessee*, 111 S.Ct. 2597 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

At its simplest level, the instant case presents a routine application of the principles of law governing claims of ineffective assistance of counsel that were set forth by this Court in the landmark case of *Strickland v. Washington*, 466 U.S. 668 (1984). This routine issue of ineffective assistance of counsel is as follows: was Fretwell's trial counsel ineffective because he failed to make a particular objection at the sentencing phase of Fretwell's capital felony murder trial. The Eighth Circuit Court of Appeals concluded that Fretwell's trial counsel was ineffective because he had failed to make a particular objection at the penalty phase of Fretwell's trial. Specifically, the Eighth Circuit concluded that Fretwell's trial counsel was ineffective, as measured by the standard set forth by this Court in *Strickland v. Washington, supra*, when trial counsel failed to object to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain" in the penalty phase of Fretwell's capital robbery-murder trial. According to the Eighth Circuit, Fretwell's trial counsel should have objected to the submission of pecuniary gain as an aggravating circumstance on the basis of the Eighth Circuit's holding in the case of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). According to the Eighth Circuit, Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

In *Collins*, the Eighth Circuit Court of Appeals held that the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments prohibit the submission to the jury of the aggravating circumstance of pecuniary gain in death penalty cases where robbery-murder is the capital murder charge at issue. The Eighth Circuit reached this conclusion by postulating the universal truth that every

robber-murderer kills in order to realize a pecuniary gain. *Collins* at 264. From this first principle the Eighth Circuit concluded that a jury would automatically find pecuniary gain as an aggravating circumstance in every robbery-murder case and that, therefore, pecuniary gain "cannot be a factor that distinguishes some robber-murderers from others." *Id.* at 264. According to the Eighth Circuit, such a state of affairs violates the Eighth Amendment's prohibition against cruel and unusual punishment because:

> [a]n aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying crime.

Id. at 264. In essence, in *Collins* the Eighth Circuit held that the pecuniary gain aggravating circumstance must further narrow a subclass of capital murderers, robber-murderers, that had already been winnowed out of the class of all murderers by Arkansas' designation of robbery-murder as capital murder. To put the matter another way, in *Collins* the Eighth Circuit Court of Appeals held that in capital murder cases, a state cannot "double-count" an attendant circumstance such as the commission of murder in order to realize a pecuniary gain as an element of capital murder and also as an aggravating circumstance that would justify the imposition of the death penalty.

The Eighth Circuit Court of Appeals handed down its decision in *Collins* on January 31, 1985. Approximately six months later, in the first week of August, 1985, Fretwell stood trial for the robbery-murder of Sherman Sullins.

In 1988, *Collins* was effectively overruled. *Collins* was effectively overruled by the decision that this Court handed down in the case of *Lowenfield v. Phelps*, 484 U.S. 231 (1988). In *Lowenfield* this Court held that the Eighth Amendment's prohibition against cruel and unusual punish-

ment does not prohibit in death penalty cases the "double-counting" of an attendant circumstance of a capital murder so that it serves as both an element of the offense and also as an aggravating circumstance that justifies the imposition of a sentence of death. In reaching this conclusion in *Lowenfield*, this Court did nothing more than apply the joint opinion that this Court had rendered twelve years earlier, in 1976, in the case of *Jurek v. Texas*, 428 U.S. 262. In *Lowenfield* this Court held:

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. *Id.*, at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. *Id.*, at 271-274. But the opinion announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg, supra*, and *Proffitt, supra*:

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose....In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.... Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option -- even potentially -- for a smaller class of murders in Texas. 428 U.S. at 270-271. (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *See also Zant, supra*, at 876, n.13, discussing *Jurek* and concluding:

> "[I]n Texas, aggravating and mittgating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to

> inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Lowenfield, at 244-46. In deed, the Eighth Circuit Court of Appeals itself reached the conclusion that this Court's decision in *Lowenfield* overruled its "double-counting" in *Collins v. Lockhart*. The Eighth Circuit acknowledged that *Collins* was no longer a valid Eighth Amendment precedent in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989). In *Perry* the Eighth Circuit held, "[w]e conclude, therefore, that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*." *Perry*, at 1393. Furthermore, in *Perry*, the Eighth Circuit noted that in *Lowenfield* this Court "...did not announce a new rule. It merely applied a rule that had been announced in *Jurek* [*v. Texas*, 428 U.S. 262 (1976)]." *Perry* at 1394. In *Collins* the Eighth Circuit had failed to cite this Court's joint opinion in *Jurek v. Texas*; therefore, *Collins v. Lockhart's* "double-counting" holding was never correct.

The guidance that this Court needs to provide to the lower courts has to do with how the lower courts should evaluate the existence of prejudice with regard to claims ineffective assistance of trial counsel in cases like the instant case. In *Strickland v. Washington*, with regard to

determining whether the defendant suffered prejudice as a result of counsel's ineffectiveness, this Court stated:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, at 694-95. Before the Eighth Circuit Court of Appeals, the parties fought it out as to whether the state trial court, the Searcy County Circuit Court, would have followed the "double-counting" rationale of *Collins v. Lockhart* had Fretwell's trial counsel made such an objection to the submission to the jury of pecuniary gain as an aggravating circumstance, assuming that the Searcy County Circuit Court "acted according to law" and "reasonably, conscientiously, and impartially applied[ed] the standards that govern the decision." Petitioner Lockhart argued (and argues) that the Searcy County Circuit Court would not have followed the "double-counting" holding of *Collins* because it was inconsistent with this Court's joint opinion in *Jurek v. Texas, supra*, which was in existence in August of 1985, when Fretwell stood trial on a charge of capital felony murder. Lockhart buttressed this argument by noting that *Lowenfied v. Phelps* had overruled *Collins v. Lockhart* and that in *Lowenfield* this Court had done nothing more than apply *Jurek*. The Eighth Circuit Court of Appeals rejected petitioner Lockhart's

contention that the Searcy County Circuit Court would have followed *Jurek* had Fretwell's counsel made a "double-counting" objection based on *Collins v. Lockhart*. The Eighth Circuit did so by noting that the death penalty sentencing procedure at issue in *Jurek* did not require the jury to balance aggravating circumstances against mitigating circumstances while Arkansas' death penalty sentencing procedure did require such balancing and by noting that the Searcy County Circuit Court was bound as a matter of Supremacy Clause to treat *Collins* as binding precedent with regard to the "double-counting" issue.[2]

Petitioner Lockhart submits that his analysis of whether the state trial court would have followed this Court's decision in *Jurek v. Texas* for purposes of determining whether *Strickland v. Washington*-prejudice occurred when Fretwell's trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection is correct and that of the Eighth Circuit Court of Appeals is incorrect. *Jurek* plainly establishes the point that states may perform the required narrowing of the class of all murderers into a subclass of death-eligible murderers at the definitional stage of capital murder and the state trial court, the Searcy County Circuit Court, would have followed *Jurek* and held that Arkansas' death penalty sentencing procedure genuinely narrowed the class of all murderers into a death-eligible subgroup by defining robbery-murder as capital murder. The Eighth Circuit in Fretwell simply fails to explain how the additional step in Arkansas' death penalty procedure of balancing aggravating circumstances

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[2]The Eighth Circuit's Supremecy Clause holding is wrong. *See United States ex rel. Laurence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965); and 1 R. Rotunda, J. Nowak and J. Young, *Constitional Law* §1.6 nn. 33-4 (1986); *see also Sawyer v. Smith*, 110 S.Ct. 2822, 2831 (1990) ("[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). The doctrine of stare decisis has nothing to do with the Supremacy Clause.

with mitigating circumstances would have kept the Searcy County Circuit Court from concluding that the required genuine narrowing occurred when robbery-murder was defined as capital felony murder. To put the matter another way, the Searcy County Circuit Court doubtlessly was astute enough to see that even if pecuniary gain was an element of robbery-murder, pecuniary gain could still be balanced in the penalty phase against Fretwell's mitigating evidence.

Lockhart concedes that even though *Collins v. Lockhart* was not a "lawless" decision in the sense that it was the product of whimsy or caprice, *Collins v. Lockhart* was an erroneous decision to the extent that it held that the Eighth Amendment forbids "double-counting." In terms of whether *Strickland v. Washington*-prejudice occurred in a case, petitioner Lockhart submits that just as defendants are not entitled "...to the luck of a lawless decisionmaker," defendants ought not be entitled to the luck of an erroneous decisionmaker. Moreover, whether a decision was erroneous for *Strickland v. Washington*-prejudice purposes is an evaluation that ought not be confined to the circumstances at the time of the defendant's trial, as is the standard for establishing the reasonableness of counsel's conduct, but ought to be evaluated on the basis of the law as it stands when the claim of ineffective assistance of counsel at issue is reviewed. If, at the time the claim of ineffective assistance of counsel is reviewed, the legal landscape has reformed since counsel's ineffective representation and the underlying case law basis for a claim of ineffective assistance of counsel is obviously not good law, then, as the dissenting opinion in *Fretwell v. Lockhart* points out, the defendant will receive a windfall benefit if the analysis of the prejudice prong of the claim of ineffective assistance of counsel does not reflect the subsequent correction of the law. *Fretwell v. Lockhart*, 946 F.2d 579. There is nothing arbitrary or capricious about depriving a defendant sentenced to death of the

erroneous vacation of his death sentence. Indeed, there is something arbitrary in permitting a defendant to escape a death sentence by taking advantage of an erroneous decision by arguing that his trial counsel was ineffective because he did not make an objection on the basis of the erroneous decision.

In closing, petitioner Lockhart notes that not only did the Eighth Circuit Court of Appeals err in determining that Fretwell was deprived of his right to the effective assistance of counsel at the penalty phase of his capital felony murder trial, but the Eighth Circuit also erred in ordering that the proper habeas corpus remedy was prohibtion of retrial of the penalty phase of Fretwell's capital murder trail and reduction of his death sentence to a sentence of life imprisonment without possibiliy of parole. Federal courts conducting habeas corpus review pursuant to 28 U.S.C. §2254 are, when the issuance of the writ is warranted, to "...dispose of the matter as law and justice require" 28 U.S.C. §2243. However, when federal courts issue the writ of habeas corpus they limit the remedy of prohibition of retrial only to those situations where the defendant should never have been brought to trial in the first place, such as when the defendant had a former jeopardy-based right or an *ex post facto*-based right not to be brought to trial at all or where the state has prosecuted the defendant on the basis of a criminal statute that was uncontitutional in some respect. L. Yackle, *Postconviction Remedies* §143 (1981). Deprivation of the Sixth and Fourteenth Amendment right to the effective assistance of counsel does no call into question the ability of the state to bring the defendant to trial in the first place nor does it involve prosecution of the defendant pursuant to an unconstitutional statute. Therefore, the Eighth Circuit Court of Appeals erred in holding that Arkansas is barred from retrying the penalty phase of Fretwell's capital felony murder case.

CONCLUSION

Petitioner Lockhart respectfully requests that this Court grant the instant application for the writ of certiorari and that this Court review the decision of the United States Eighth Circuit Court of Appeals in the case of *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991).

Respectfully submitted,

WINSTON BRYANT
Arkansas Attorney General

BY: CLINT MILLER
Member of the Bar of the Court
Senior Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-3657

Counsel for Petitioner
A. L. Lockhart, Director
Arkansas Department of Correction

APPENDIX

Bobby Ray FRETWELL, Appellee,

v.

A.L. LOCKHART, Director, Arkansas
Department of Correction,
Appellant.

Bobby Ray FRETWELL, Appellant,

v.

A.L. LOCKHART, Director, Arkansas
Department of Correction,
Appellee.

Nos. 90-2105, 90-2315.

United States Court of Appeals,
Eighth Circuit

Submitted January 7, 1991
Decided Sept. 23, 1991.

Clint Miller, Asst. Atty. Gen.,
Little Rock, AR, for appellant.

Richard R. Medlock,
Little Rock, AR, for appellee.

Before LAY, Chief Judge, and
MAGILL and LOKEN, Circuit Judges

MAGILL, Circuit Judge.

A.L. Lockhart, Director of the Arkansas Department of Correction, appeals the district court's grant of habeas corpus relief to Bobby Ray Fretwell on the ground that Fretwell had received ineffective assistance of counsel at his capital felony murder trial. Fretwell cross-appeals, raising other claims of ineffective assistance of counsel. We affirm the district court's decision in part and remand for further proceedings consistent with this opinion.

I.

In August 1985, Fretwell was tried and convicted of capital felony murder in Searcy County, Arkansas. The jury found that Fretwell had murdered Sherman Sullins in the course of a robbery.[1] At a separate sentencing hearing,[2] the state argued that the evidence admitted during the guilt phase of Fretwell's trial established the following two aggravating circumstances: that the capital

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[1] A more complete account of the trial can be found in *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1334-36 (E.D. Ark. 1990).

[2] Arkansas has adopted a bifurcated capital sentencing scheme. First, the jury must find the defendant guilty of a capital crime. Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977) (presently codified at Ark. Code Ann. §5-10-101(a)(1) (1987)). Then, after finding a defendant guilty, the court must hold a separate sentencing hearing to determine whether the defendant should receive the death penalty or life imprisonment without parole. At the sentencing hearing, the jury is specifically instructed to weigh aggravating circumstances against mitigating circumstances. If the jury finds no aggravating circumstances, then the jury does not reach the weighing stage and must impose a sentence of life imprisonment without parole. Arkansas defines an exhaustive list of aggravating circumstances and a nonexhaustive list of mitigating circumstances to be used by the jury in its death penalty decisions. Ark. Stat. Ann. §41-1301 to 1303 (Repl. 1977) (presently codified at Ark. Code Ann. §5-4-602 to 604 (1987)).

felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; and that the capital felony was committed for purposes of pecuniary gain. Fretwell's attorney argued that these allegations did not constitute valid aggravating circumstances and that Fretwell's difficult and disadvantaged childhood constituted a mitigating factor. The trial court instructed the jury on the two aggravating circumstances requested by the state. Fretwell's attorney did not object. The trial court also instructed the jury on the one mitigating circumstance raised by Fretwell's attorney. The jury found that only the pecuniary gain aggravating circumstance was present and that there were no mitigating circumstances. Based on these findings, the jury concluded that Fretwell's punishment should be death.

Fretwell's conviction and sentence were affirmed on direct appeal in 1986 by the Arkansas Supreme Court. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Fretwell's collateral attacks in state courts on his conviction and sentence were unsuccessful. Fretwell then filed a habeas petition in federal district court, claiming that the trial court erred in refusing to set aside the jury's verdict as being contrary to the evidence and that he received ineffective assistance of counsel. Fretwell argued that his counsel was ineffective because counsel failed to object to the aggravating circumstances jury instructions; because counsel failed to prepare and present evidence at the suppression hearing on Fretwell's confession; because counsel argued for an erroneously-worded jury instruction on the lesser included offense of first degree murder; and because counsel failed to investigate or prepare for the sentencing phase. The district court held that Fretwell was procedurally barred from raising his first claim and rejected two of the ineffective assistance of counsel claims, but granted relief on the claim that trial counsel was ineffective because he failed to object to the jury

instructions on aggravating circumstances.[3] The district court noted that seven months before Fretwell's trial, the Eighth Circuit had held that the Constitution is violated when a trial court uses pecuniary gain as an aggravating circumstance in robbery/murder cases because such double counting does not genuinely narrow the class of persons eligible for the death penalty. See *Collins v. Lockhart*, 754 F.2d 258, 263-64 (8th Cir. 1985). The district court then held that under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Fretwell's counsel was ineffective. First the district court held that Fretwell's counsel violated his duty to be aware of all law relevant to Fretwell's death penalty case. It further held that the error was prejudicial under *Strickland* because the jury found only one aggravating circumstance that Fretwell had committed the murder for pecuniary gain. The district court stated that it was confident that, had Fretwell's counsel objected, the trial court would have followed *Collins* and thus would not have issued the pecuniary gain instruction. Consequently, the jury would have found no aggravating circumstances and it would have had no choice but to sentence Fretwell to life imprisonment without parole. Having held that Fretwell's trial counsel was ineffective, the district court granted habeas relief, conditionally vacating Fretwell's death sentence. The district court gave the State of Arkansas the option to conduct another sentencing hearing within ninety days. If no such hearing were held, the district court ordered that Fretwell's sentence be permanently reduced to life imprisonment without the possibility of parole. Lockhart appeals this decision and has received a temporary stay of

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[3] The district court did not address Fretwell's claim that his counsel failed to investigate or prepare for the penalty phase because it found that ineffectiveness of counsel was established by counsel's failure to object to the aggravating circumstances instructions.

the tolling of the ninety-day period while we resolve this appeal. Fretwell cross-appeals the district court's dismissal of his other ineffective claims, requesting that his sentence be unconditionally reduced to life imprisonment without parole, or in the alternative that he be resentenced under the law that was in effect at the time of his first trial.

II.

Lockhart argues on appeal that Fretwell was not denied effective assistance of counsel by his counsel's failure to make an objection based on *Collins* to the pecuniary gain instruction. Lockhart argues that even if Fretwell's attorney had objected to the pecuniary gain instruction, the trial court would probably have overruled the objection because *Collins* was a "lawless" decision. Lockhart contends that *Collins* was clearly inconsistent with the Supreme Court's decisions in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and therefore lacked any precedential value. As evidence of the "lawless" nature of the *Collins* decision, Lockhart cites a later Supreme Court decision permitting the use of an element of a capital crime as an aggravating circumstance in the sentencing phase, *see Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), and this court's subsequent decision to overrule *Collins*, *see Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989). Fretwell argues that the trial court would have sustained a *Collins* objection had Fretwell's counsel raised the issue because *Collins* was good law at the time of his trial.

Since all the claims Fretwell raises on appeal involve his right to effective assistance of counsel, we begin our analysis with the standard set by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, an ineffective assistance of counsel claim will succeed only if

(1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The district court found that the performance of Fretwell's trial counsel was deficient because he was ignorant of *Collins*. Lockhart does not challenge this finding, nor do we. Therefore, the only question is whether this deficient performance prejudiced Fretwell's defense.

Lockhart claims that, at the time of Fretwell's trial, the Supreme Court case law would have led the trial court to overrule a *Collins* objection. We disagree. In *Jurek*, the Supreme Court considered whether the legislature could narrow the class of individuals eligible for the death penalty at the guilt phase instead of at the sentencing phase. *Jurek* involved a capital sentencing scheme that requires a court to conduct a separate sentencing proceeding after a defendant is convicted of a capital offense. *Jurek*, 428 U.S. at 267, 96 S.Ct. at 2954. During this punishment phase, both parties can present evidence and make arguments regarding the appropriate sentence. At the conclusion of the sentencing proceeding, the trial court must present the jury with questions[4] which, if answered in the affirmative, mandate the imposition of the death penalty. *Id.* The Supreme Court

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In *Jurek*, Texas law required that the jury answer "yes" to the following questions:

(1) whether the conduct of the defendant that cause the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any by the deceased.

Tex. Code Crim. Proc. , art. 37.071(b) (Supp. 1975-76).

reasoned that these questions allow the jury to consider mitigating circumstances that might militate against imposing the death penalty. Since the Texas capital sentencing scheme requires the jury to find at least one aggravating circumstance in the guilt phase and allows the jury to consider mitigating circumstances in the sentencing phase, the Supreme Court held that the scheme was constitutional.[5] *Id.* at 276, 96 S.Ct. at 2958.

The question before the Court in *Jurek* was whether the state legislature could narrow the class of individuals eligible for the death penalty at the guilt phase by narrowing its definition of capital murder. The Court held that such narrowing is permissible. *Id.* at 276,96 S.Ct. at 2958. Lockhart argues that *Jurek* permitted Arkansas to accomplish the requisite narrowing by including the

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[5] The Supreme Court has held that the Constitution requires capital sentencing schemes to fulfill two requirements. First, the scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877, 103 S.Ct. at 2742. Second, the scheme "may not limit the sentencer's consideration of any relevant evidence that might lead it to decline to impose the death penalty." *Criminal Procedure Project*, 79 Geo.L.J. 1089, 1129-30 (citing *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987); *Sumner v. Shuman*, 483 U.S. 66, 81-82, 107 S.Ct. 2716, 2725-2726, 97 L.Ed.2d 56 (1987); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824-25, 95 L.Ed.2d 347 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The use of aggravating circumstances satisfies the first requirement, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam), and the consideration of mitigating circumstances satisfies the second requirement, *Lockett v. Ohio*, 438 U.S. 586, 606-07, 98 S.Ct. 2954, 2965-66, 57 L.Ed.2d 973 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct 869, 874, 71 L.Ed.2d 1 (1982).

aggravating circumstance of pecuniary gain at the guilt phase. He argues that the statutory requirement that the jury find at least one aggravating circumstance in the sentencing phase is superfluous and does not obviate the narrowing that was already performed in the guilt phase. Lockhart's reliance upon *Jurek* is misplaced. The Court in *Jurek* did not address the question of whether a state can use the same aggravating circumstance in both the guilt phase and the sentencing phase. That question was resolved by the Supreme Court in *Lowenfield*, which was decided more than three years after Fretwell's trial. See *Lowenfield*, 484 U.S. at 246, 108 S.Ct. at 555. Furthermore, the capital sentencing scheme reviewed by the Court in *Jurek* was significantly different from Arkansas' capital sentencing scheme. Arkansas requires that the jury balance aggravating and mitigating circumstances in deciding whether the death penalty is appropriate. In *Jurek*, the Court viewed the sentencing phase questions only as an opportunity for the jury to consider mitigating circumstances. Since the Supreme Court reviews the constitutionality of a particular death sentence in the specific context of the state's capital sentencing scheme, *see Zant v. Stephens*, 462 U.S. at 890, 103 S.Ct. at 2749, *Jurek* does not make a definitive statement about Arkansas' capital sentencing scheme.

In *Zant v. Stephens*, another case cited by Lockhart to show that *Collins* was lawless when it was decided, the Supreme Court held that a subsequent invalidation[6] of an aggravating circumstance would not justify reversal of the defendant's sentence if there were other valid

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[6] The Court noted that an aggravating circumstance that was invalidated because it was constitutionally impermissible or totally irrelevant, e.g., the race, religion, or political affiliation of the defendant; or because the circumstance should militate in favor of a lesser penalty, e.g., defendant's mental illness, would require the death sentence to be set aside. *Zant v. Stephens*, 462 U.S. at 885, 103 S.Ct. at 2747.

aggravating circumstances, where the capital sentencing scheme required that one or more aggravating circumstances be found. 462 U.S. at 890, 103 S.Ct. at 2749. Lockhart argues that *Zant* reiterates the Supreme Court's ruling in *Jurek*, which allows states to perform the requisite constitutional narrowing during the guilt phase of a capital felony. Apparently, Lockhart is arguing that even if the sentencing phase finding of an aggravating circumstance is invalidated, the death penalty sentence must stand because the jury has already found the aggravating circumstance of pecuniary gain at the guilt phase. However, in *Zant*, the Court reiterated the importance of considering the capital sentencing scheme in death penalty decisions, and specifically limited its holding by stating:

> [W]e do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

Zant, 462 U.S. at 890, 103 S.Ct. at 2750. Therefore, since the Arkansas capital sentencing scheme requires the jury to balance aggravating and mitigating circumstances, Zant did not preclude the result in *Collins*.

Nor does the fact that we have interpreted the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), as overruling *Collins*, *see Perry*, 871 F.2d at 1393, support Lockhart's claim that the Fretwell trial court woulld have ignored a *Collins* objection. First, as lockhart acknowledge, both *Lowenfield* and *Perry* were decided more than three years after Fretwell's trial and consequently do not support his claim that *Collins* was "lawless". Second, Lockhart's claim that *Lowenfield's* reasoning applies to the Arkansas

sentencing scheme ignores the significant difference between the Arkansas capital sentencing scheme and the *Lowenfield* scheme.[7] In *Lowenfield*, the Louisiana capital sentencing scheme defined the crime of capital murder to include aggravating circumstances. The scheme also required the jury to find at least one aggravating circumstance at the sentencing phase before the jury could impose the death penalty. If the jury found at least one aggravating circumstance, then the Louisiana scheme directed the jury to consider any mitigating circumstances before imposing the death penalty. The Court held that Louisiana's capital sentencing scheme was constitutional, even though the scheme allowed the jury to use the same aggravating circumstance of pecuniary gain at both the guilt phase and the sentencing phase. *Lowenfield*, 484 U.S. at 246, 108 S.Ct. at 555. The Court stated that the use of aggravating circumstances was "a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion" and that *Jurek* permitted this narrowing to take place at either the guilt phase or the sentencing phase. *Id.* at 244-45, 108 S.Ct. at 554-55. The Court concluded that Louisiana performed the requisite narrowing at the guilt phase. Therefore, since the narrowing had already occurred, the requirement that a jury find at least one aggravating circumstance at the sentencing phase was superfluous and did not violate the Constitution. *Id. at* 246, 108 S.Ct. at 555. The Louisiana sentencing scheme differs significantly from the Arkansas scheme in that Arkansas directs the jury to weight aggravating circumstances against mitigating circumstances before imposing the death penalty; Louisiana merely requires that the jury find at least one aggravating circumstance and then consider mitigating

[7] In fact, the *Lowenfield* scheme was more like the *Zant* scheme than it was like the Arkansas scheme in that the schemes in *Lowenfield* and *Zant* do not require the jury to weigh mitigating and aggravating circumstances, while the Arkansas scheme does.

circumstances. *See Zant v. Stephens*, 462 U.S. at 890, 103 S.Ct. at 2749 (specifically limiting holding to exclude statutory schemes that require the sentencer to weigh aggravating and mitigating circumstances).

While the Supreme Court has not required states to adopt any particular capital sentencing scheme, *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), the Court places great importance on the specifics of a state's sentencing scheme when reviewing the constitutionality of a death sentence. *See Zant v. Stephens*, 462 U.S. at 874-75, 103 S.Ct. at 2741-42 (quoting *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859 (1976)). Therefore, Lockhart's claim that *Collins* was lawless requires us to pay close attention to the sentencing schemes reviewed in the specific cases. *Jurek* involved a capital sentencing scheme in which the constitutional narrowing of the class of defendants eligible for the death penalty occurred at the guilt phase, in the form of a narrowly defined capital murder statute. The jury was then allowed to consider mitigating circumstances in a separate sentencing phase. In *Zant*, the court reviewed a death sentence in the context of a capital sentencing scheme that accomplished the constitutional narrowing at the sentencing phase. This scheme required the jury to find one or more statutory aggravating circumstances before a defendant was eligible for the death penalty. Only if the jury found one or more statutory aggravating circumstances was it to consider any mitigating circumstances. After considering the mitigating circumstances, the jury was then required to decide whether to impose the death penalty. The capital sentencing scheme in *Lowenfield* was a hybrid of the *Jurek* and *Zant* schemes. The *Lowenfield* scheme performed the constitutional narrowing at the guilt phase, like the *Jurek* scheme, by including aggravating circumstances in the statutory definition of capital murder. However, the *Lowenfield* scheme also required the jury to find at least one aggravating circumstance at the sentencing phase.

Since the jury had already found one aggravating circumstance at the guilt phase, the sentencing phase aggravating circumstance requirement would always be met. After meeting the aggravating circumstance requirement, the jury was then directed to consider any mitigating circumstances before deciding whether to impose the death penalty. The Arkansas capital sentencing scheme significantly differs from the schemes in *Jurek*, *Zant*, and *Lowenfield* because it requires the jury to weigh aggravating circumstances against mitigating circumstances in the sentencing phase. Because of this difference and because of the analytical complexity of the issues involved, we reject Lockhart's claim that the trial court would have employed the *Lowenfield* reasoning to a *Collins* objection and thereby concluding that *Collins* was lawless.[8]

Having rejected Lockhart's claim that *Collins* was lawless at the time of Fretwell's trial, we now turn to whether a state trial court would have sustained a *Collins* objection to the instruction on pecuniary gain as an aggravating circumstance. Since we have already determined that the precedent that existed at the time of Fretwell's trial was not clearly inconsistent with *Collins* and since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins* had Fretwell's attorney made

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[8] In *Perry*, we extended *Lowenfield's* holding to cover Arkansas' sentencing scheme. This fact alone does not render *Collins* lawless. There is no question that *Collins* was "good" law at least until *Lowenfield*. The fact that we held *Lowenfield* to apply retroactively to the Arkansas scheme, *see Perry*, 871 F.2d at 1394, does not affect our analysis in this case. Fretwell does not challenge the authority of the Arkansas capital sentencing scheme. Such a challenge would fail under a retroactive application of *Lowenfield*. Rather, the question before us is whether Fretwell's trial court, at the time of his trial, would have followed *Collins*. The retroactive nature of *Lowenfield* cannot dispositively resolve this question.

one. Therefore, the district court correctly found that Fretwell's sixth amendment right to effective assistance of counsel was violated.

The situation in *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), relied on by the dissent, was totally different than in the present case. In *Nix*, the defendant was attempting to subvert the judicial process by lying under oath. The attempted perjury in that case bears no analogy to Fretwell's entitlement to rely on a case that was good law at the time he would have used it. The concurrence in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), also relied upon by the dissent, argues that the court must grant relief only when the "fundamental fairness of the trial" was affected by trial error. Perhaps determining fundamental fairness is a subjective analysis, but this court already has extended the benefit of *Collins* to several prisoners because it would be an "extreme inequity" to do otherwise. See *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986); *Ruiz v. Lockhart*, 806 F.2d 158 (8th Cir. 1986). In our view, fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney's error.

Our decision in *Perry* does not alter our approach. The *Perry* case involved a direct constitutional challenge to the sentencing scheme, not an ineffectiveness of counsel claim. The *Kimmelman* Court acknowledged that ineffective assistance of counsel claims are viable in habeas even if the underlying substantive violation does not directly relate to the defendant's guilt or innocence. 477 U.S. at 379-80, 106 S.Ct. at 2585-86. Because Fretwell can show prejudice, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), he is entitled to relief.

The district court's order granting habeas relief invalidated Fretwell's original sentence. This order allowed the state to resentence Fretwell within ninety days; however, if the state fails to hold such a hearing,

Fretwell's sentence will be reduced to life imprisonment without parole. We do not believe that a new sentencing hearing should be held. As Fretwell points out in his brief, to resentence him under current law would perpetuate the prejudice caused by the original sixth amendment violation. The dissent argues that applying *Collins*, as should have been done originally, conflicts with our decision in *Perry*, where, in overruling *Collins*, we applied *Lowenfield* retroactively and reinstated the defendant's death sentence. This argument overlooks the fact that the defendant in *Perry* was sentenced to death under the Arkansas sentencing scheme at least three years before *Collins* was decided. *See Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982). Thus, he was not entitled to the benefits of an undisturbed, retroactively applied *Collins* after it had been overruled. Fretwell, however, was sentenced while *Collins* was good law, and was entitled to its benefits *at the time of his sentencing*.

The only remedy that will remove the prejudice he suffered is the reduction of his sentence to life without parole. Therefore, we remand this case to the district court to modify its order to reduce unconditionally Fretwell's sentence to life imprisonment without parole. Since Fretwell's claims of ineffective assistance of counsel at the guilt phase are without merit, we affirm the district court's denial of relief on those claims.

III.

For the foregoing reasons, we affirm, in part, the district court's grant of habeas relief and remand for proceedings consistent with this opinion.

LOKEN, Circuit Judge, dissenting:

I respectfully dissent for two reasons. First, the majority holds that Fretwell received constitutionally ineffective assistance of counsel because trial counsel failed to object to an aggravating circumstances instruction that was proper under *Lowenfield v. Phelps*, 484 U.S. 231

108 S.Ct. 546, 98 L.Ed.2d 568 (1988). I conclude that this ineffective assistance claim cannot satisfy the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the majority holds that Arkansas must resentence Fretwell to life imprisonment. I conclude that this remedy exceeds the authority of a federal habeas court and conflicts with our prior decision in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989).

I.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-692, 104 S.Ct. at 2066-2067. With this, the Supreme Court laid the foundation for analyzing claims of ineffective assistance of counsel. The Court then enunciated its now-familiar ineffectiveness and prejudice test for determining whether counsel's assistance was so defective as to require reversal of a death sentence.

Proof of prejudice is an essential prerequisite to relief under *Strickland*. When dealing with issues relating to counsel's performance during a trial or sentencing hearing, proof of prejudice normally and quite logically focuses on the time in question. The prejudice test adopted in *Strickland* -- "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, 104 S.Ct. at 2068 -- reflects that focus. In this case, the majority limits its analysis entirely to that focus and concludes that Fretwell was prejudiced because his sentence probably

would have been different had his counsel made a *Collins* objection.

However, there is something more to *Strickland's* concept of constitutional prejudice. That something more is best illustrated by *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), a case in which trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance. As two commentators have noted, "All nine Justices concluded that, even if defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel's behavior still would not have been prejudicial. The reason was apparently that perjury is criminal conduct that detracts from the reliability of judgments." Jeffries & Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 686 (1990). Justice Blackmun, in a concurring opinion for four Justices, put it more bluntly: "Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." 475 U.S. at 186-187, 106 S.Ct. at 1004-1005.

This aspect of the prejudice analysis was more fully articulated in Justice Powell's concurring opinion in *Kimmelman v. Morrison*, 477 U.S. 365, 392, 106 S.Ct. 2574, 2591, 91 L.Ed.2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bedsheet. The Court held that *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) did not bar this ineffective assistance claim. However, Justice Powell wrote separately to clarify that the Court in remanding was not resolving a *Strickland* prejudice issue that had not been argued:

> [T]he admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict.... Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment.... [I]t would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall.

477 U.S. at 396-397, 106 S.Ct. at 2954-2955. *See also Woods v. Whitley*, 933 F.2d 321, 324 (5th Cir. 1991).

The majority and the district court have granted Fretwell just such a windfall. *Lowenfield* established that Fretwell's sentencing jury was given instructions that did not violate his Eighth Amendment rights. Moreover, this court in *Perry* held that *Lowenfield* did not create a new rule of law and therefore must be applied retroactively. 871 F.2d at 1394. By focusing only on the probable effect of counsel's error at the time of Fretwell's sentencing, the majority misses the broader and more important point that his sentencing proceeding reached neither an unreliable nor an unfair result. Consequently, we are granting Fretwell a constitutional "windfall" that, as Justice Powell warned in *Kimmelman*, loosens the ineffective assistance inquiry from its Sixth Amendment moorings.

Like Justice Blackmun in *Nix* and Justice Powell in *Kimmelman*, I conclude that a federal court has no power to grant habeas relief to Fretwell, a state prisoner, unless ineffective assistance of counsel has deprived him of a fundamentally fair sentencing, or of a specific constitutional right designed to guarantee a fair sentencing. *Lowenfield* and *Perry* establish that Fretwell

was deprived of neither. Accordingly, I would reverse the district court's grant of habeas corpus relief.

II.

Having concluded, erroneously in my view, that Fretwell was denied effective assistance of counsel, the majority orders Arkansas to resentence him to life imprisonment without parole. I dissent from this extraordinary intrusion into the state's authority to conduct this criminal proceeding consistent with current constitutional principles.

Presumably the majority limits the state's resentencing options to life imprisonment on the assumption that Fretwell's sentencing jury would have sentenced him to life if not instructed that pecuniary gain could be an aggravating circumstance. Of course, this assumption is highly speculative.[1] But the remedy is more than speculative, it goes beyond that afforded when *Collins* was still the law. Indeed, two of the four Arkansas prisoners who were resentenced prior to *Lowenfield* because of a *Collins* error received the death penalty upon resentencing. *See Perry*, 871 F.2d at 1394 n.7; *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989).

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[1] I cannot agree that Fretwell would certainly have received a life sentence if his attorney had made a *Collins* objection and the trial court had not given the pecuniary gain instruction. The jury was instructed on two potential aggravating circumstances. Although it found only one, pecuniary gain, it concluded that the death penalty was appropriate. Thus, if pecuniary gain had not been charged, the jury would have had to change either its finding as to the other aggravating circumstance, or its conclusion as to the death penalty, to avoid an inconsistent sentencing verdict. It is sheer speculation for the majority to predict what decision that jury would have made.

More importantly, the majority's remedy conflicts with our prior decision in *Perry*, which overruled *Collins*. In *Perry*, we applied *Lowenfield* retroactively and reinstated the defendant's death penalty because he was not entitled to "the benefit of an undisturbed *Collins*...." *Perry*, 871 F.2d at 1394 n. 7. Thus, the majority's remedy, which goes beyond that of an "undisturbed *Collins*," is in clear conflict with *Perry*.

The proper remedy here should reflect three principles. First, Arkansas should be given an opportunity to resentence Fretwell; that has been the law since at least *In re Bonner*, 151 U.S. 242, 259-260, 13 S.Ct. 323, 326-327, 38 L.Ed. 149 (1894). Second, Arkansas should be permitted to seek the death penalty at the resentencing; otherwise, this court will be mandating a procedure in the name of *Collins*, an overruled case, that neither *Collins* nor the Constitution *ever* required. Because the first jury sentenced Fretwell to death, there is no Fifth Amendment double jeopardy bar if the state decides to seek that penalty at the resentencing. *Compare Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), *with Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

Finally, I would hold that, because *Lowenfield* is now the law, Arkansas must be permitted to instruct the jury at Fretwell's resentencing that pecuniary gain is a potential aggravating circumstance. Although this result might be viewed as depriving Fretwell of the benefit of *Collins*, the law has changed, and it has been clear for nearly a century that procedural or evidentiary changes in the law may constitutionally be applied at a criminal defendant's second trial or resentencing. *See Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (evidence declared inadmissible at first trial may be admitted at second trial under new statute authorizing its admission), cited approvingly in *Dobbert v. Florida*, 432

U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977).[2] In addition, the nature of the federal habeas corpus remedy compels this result, for it is surely beyond our habeas corpus powers to prohibit the state from conducting the resentencing proceeding in a manner wholly consistent with the Constitution. *See* 28 U.S.C. §2254(a).

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[2] *See also Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *Coleman v. Saffle*, 869 F.2d 1377, 1385-1387 (10th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1835, 108 L.Ed.2d 964 (1990); *Hulsey v. Sargent*, 821 F.2d 469, 471 (8th Cir.), *cert. denied*, 484 U.S. 930, 108 S.Ct. 299, 98 L.Ed.2d 258 (1987); *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985).

Bobby Ray FRETWELL, Plaintiff

v.

A.L. LOCKHART, Director, Arkansas Department of Correction, Defendant.

No. PB-C-87-316.

United States District Court, E.D. Arkansas Pine Bluff Division

June 29, 1990.

Richard Medlock, Little Rock, AR for plaintiff

Clint Miller, Asst. Atty. Gen., Little Rock, AR for defendant

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MEMORANDUM OPINION

ROY, District Judge.

Before the Court is the Petition for Writ of Habeas Corpus of Bobby Ray Fretwell, petitioner herein, to which respondent has fully responded. After numerous and lengthy delays, the Court has carefully reviewed all pleadings and submissions of both parties and the petition is ripe for consideration on its merits.

Early on the morning of December 14, 1984, petitioner gained entry into the home of Sherman Sullins, a resident of Marshall, Arkansas. Petitioner proceeded to rob Mr. Sullins of his money at gun point and struck him on the head with the weapon. When that blow failed to render Sullins unconscious, petitioner placed the barrel of the gun against Sullins' temple and shot and killed him. Petitioner then took the keys to Sullins' pick-up truck and fled, along with petitioner's wife and another companion, in that vehicle. Petitioner and his companions were ultimately arrested in the State of Wyoming while traveling in Sullins' truck. The murder weapon was subsequently found in the truck.

Petitioner was returned to Arkansas and charged with capital murder in the slaying of Sherman Sullins. A plea of not guilty by reason of insanity was initially entered on petitioner's behalf, but that plea was withdrawn after psychological and psychiatric examinations revealed that petitioner was competent both at the time of the commission of the offense and the time of trial. Trial counsel for petitioner then attempted to persuade the trial court to permit petitioner to plead guilty to capital murder in exchange for an agreement to sentence petitioner to life imprisonment without the possibility of parole. The trial court denied that request when the prosecuting attorney objected, as was his right under Arkansas law.

Trial counsel filed a number of pre-trial motions, most notably a motion to suppress several confessions given by petitioner, first to the authorities in Wyoming and later to those in Arkansas. On August 6, 1985, just prior to the beginning of the guilt phase of petitioner's trial, the trial court conducted a hearing on the motion to suppress. After hearing testimony from law enforcement officials from Wyoming and Arkansas, from a psychologist and a psychiatrist from the Arkansas State Hospital, and from petitioner himself, the trial court concluded that petitioner had made a knowing and intelligent waiver of his right against self-incrimination and that the confessions had been voluntarily given. The motion to

suppress was denied.

After considering the overwhelming evidence against his client and the circumstances surrounding the crime, trial counsel determined that it was in his client's best interest to admit his culpability to the jury and appeal to their mercy in an attempt to avoid imposition of the death penalty. The record reflects that petitioner agreed with trial counsel's strategy and willingly went along with it. Rather than put the prosecution to its burden of proving petitioner's guilt, trial counsel and petitioner admitted his culpability throughout the guilt phase of the trial and appealed for mercy, either by a conviction for first degree murder or imposition of a sentence of life without parole. Petitioner was convicted of capital murder on August 7, 1985.

Immediately after the jury returned its verdict of guilty on the charge of capital murder, the trial court commenced the sentencing phase of the trial. The prosecution declined to put on any additional evidence of aggravating circumstances beyond that adduced during the guilt phase. Trial counsel called both petitioner and Dr. Douglas Stevens, a clinical psychologist, as witnesses on petitioner's behalf in an effort to establish mitigating circumstances. In the closing arguments, the prosecution argued that the evidence had established the existence of two aggravating circumstances -- one, that the murder was committed for pecuniary gain; and two, that the murder was committed to facilitate petitioner's escape. Trial counsel argued that neither of those allegations constituted valid aggravating circumstances under the law and that the evidence had clearly established that petitioner's difficult and disadvantaged childhood was a mitigating factor for the jury.

The trial court submitted the two aggravating circumstances advanced by the prosecution for the jury's consideration. After deliberating for approximately six and one-half hours, the jury found that petitioner had committed the murder for pecuniary gain and found no

mitigating factors in petitioner's favor. The jury determined that petitioner's punishment should be death.

Petitioner's conviction and sentence were affirmed on appeal to the Supreme Court of Arkansas in 1986. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Petitioner's subsequent petition for post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure was denied on April 27, 1987. *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987). Thereafter, on May 27, 1987, petitioner filed the petition now before this Court.

Petitioner advances the following five grounds for relief from his conviction and sentence:

1. Petitioner was denied effective assistance of counsel at the guilt phase of his trial in violation of his rights under the Sixth and Fourteenth Amendments.
2. Petitioner was denied effective assistance of counsel at the guilt phase of his trial in violation of the Sixth and Fourteenth Amendments because counsel failed to prepare and present evidence at the suppression hearing on defendant's confession.
3. Petitioner was denied effective assistance of counsel at the guilt phase of his trial in violation of his rights under the Sixth and Fourteenth Amendments because counsel argued for the inclusion of an erroneously worded jury instruction on the lesser included offense of first degree murder.
4. Petitioner was denied effective assistance of counsel at the penalty phase of his trial in violation of his rights under the Sixth and Fourteenth Amendments because counsel failed to investigate or prepare for the penalty phase.

5. The trial court erred in refusing to set aside the verdict as being contrary to the evidence.

Petitioner's fifth ground for relief, that the trial court erred in refusing to set aside the verdict, was not raised on appeal to the Supreme Court of Arkansas. Further, no explanation for the failure to raise that point on appeal has been advanced. Accordingly, review of that claim in this federal habeas corpus proceeding is barred. See *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *see also Stokes v. Armontrout*, 893 F.2d 152 (8th Cir. 1989).

In his second ground for relief, petitioner contends that he was denied effective assistance of counsel during the guilt phase by trial counsel's failure to prepare and present evidence at the suppression hearing. The Court has thoroughly reviewed the transcript of the suppression hearing held on August 6, 1985. Trial counsel objected to holding the hearing at that time due to the unavailability of his expert witness, Dr. Stevens, at that time. That objection was overruled. It is apparent from the transcript that trial counsel had indeed prepared a strategy for the suppression hearing. Every witness was questioned about the coercive effect of petitioner's arrest and questioning in Wyoming, and the possible exacerbation of that effect by fatigue. The state's experts were also questioned about the possibility of petitioner being predisposed to coercion by certain personality traits. Finally, although Dr. Stevens was unable to attend the hearing, the trial court had trial counsel state on record what the substance of Dr. Stevens' testimony would have been and accepted that testimony as true for the purposes of the motion.

Allegations of ineffective assistance of counsel are governed by the holding of the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail upon such a claim, a petitioner must show that trial counsel's performance seriously undermined the proper functioning of the

adversarial process and that counsel's error resulted in prejudice so pronounced as to have deprived petitioner of a fair trial. In other words, the petitioner must establish a reasonable probability that a different result would have attained but for counsel's errors.

The Court finds that petitioner has failed to show in this case that trial counsel's performance with respect to the suppression hearing fell outside the range of reasonable professional assistance. Moreover, the evidence presented at the hearing was clearly sufficient to establish the voluntariness of petitioner's confessions. The Court is convinced that the suppression motion would have been denied regardless of trial counsel's conduct. From all the matters and circumstances presented, the Court finds no merit in this ground.

In ground three petitioner asserts that he was denied effective assistance of counsel during the guilt phase on account of trial counsel's insistence on the inclusion of an erroneous jury instruction on the lesser included offense of first degree murder. While other counsel may have preferred that the instruction be worded differently, the Court cannot say that trial counsel was ineffective because of his preference for the language used. Under the instructions given, the jury was advised that first degree murder is a lesser included offense of capital murder and that they could find petitioner guilty of either, or not guilty of both. The Court finds no significant deficiency in counsel's conduct on this point. Again, in light of the evidence presented and the circumstances attendant to this case, the Court is convinced that the jury would have convicted petitioner of capital murder regardless of the wording of the instructions. The jury took only 25 minutes to select a foreman and return its verdict of guilty on the charge of capital murder. The Court finds no merit in this ground for relief.

In his first ground for relief, petitioner contends

that he was denied effective assistance of counsel at the sentencing phase of the trial by counsel's failure to object to the submission to the jury of the aggravating circumstances of "pecuniary gain" and "escape."[1] Insomuch as the jury did not find that the murder was committed to facilitate an escape, petitioner was not prejudiced by the submission of that aggravating circumstance.

The Court does, however, have grave concern about trial counsel's failure to object to the trial court's submission to the jury of pecuniary gain as a potential aggravating circumstance in the sentencing phase of this robbery/murder case. Some seven months prior to petitioner's trial, the United States Court of Appeals for the Eighth Circuit had condemned the practice of submitting pecuniary gain as an aggravating circumstance in robbery/murder cases. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985).[2] Trial counsel was apparently unaware of *Collins*, for he failed to raise it at trial and on appeal. As an attorney representing a defendant in a capital murder case, trial counsel had a duty to be aware of all law relevant to death penalty cases. The Court finds trial counsel's ignorance of *Collins* to have been a serious and significant error. Having so found, the Court must now determine, pursuant to *Strickland*, whether this error had a prejudicial effect on the outcome of the trial.

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[1] The discussion under ground one does not square with the heading, so the Court has disregarded the heading in its discussion of this point.

[2] Although *Collins* was eventually overruled in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989), it was the law in the Eighth Circuit for more than four years.

Two potential aggravating circumstances were submitted to the jury for their consideration in the sentencing phase of petitioner's trial. The jury unanimously found that only one -- that petitioner had committed the murder for pecuniary gain -- had been established. This Court is confident that the trial court would have followed the ruling in *Collins* had trial counsel made an appropriate motion. Although *Collins* has since been overruled, it was the law in the Eighth Circuit at the time of petitioner's trial and this Court has no reason to believe that the trial court would have chosen to disregard it. Thus, had the trial court declined to submit pecuniary gain as a possible aggravating circumstance, the jury would have had no option but to sentence petitioner to life imprisonment without parole. The prejudice to petitioner from counsel's error is obvious. The Court finds that petitioner was deprived of effective assistance of counsel during the sentencing phase of his trial. Having found ineffective assistance of counsel on this point, the Court will not address petitioner's ground concerning trial counsel's alleged failure to investigate or prepare for the penalty phase.

The sentence of death by electrocution imposed against petitioner shall be vacated and set aside. Unless the State of Arkansas decides to conduct another sentencing hearing in petitioner's case within ninety days of the date of the Judgment entered in accordance with this Memorandum Opinion, petitioner's sentence shall be reduced to life imprisonment without the possibility of parole.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2105EAPB

Bobby Ray Fretwell, *

Appellee. *

v. *

A.L. Lockhart, Director * Order Denying Petition for Rehearing and suggestion for Rehearing En Banc
Arkansas Department of *
Corrections, *

Appellant. *

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Fagg, Bowman, Wollman, Beam, and Loken voted to grant.

Rehearing by the panel is also denied.

December 4, 1991

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2105EAPB / 90-2315EA

Bobby Ray Fretwell, Appellee. v. A.L. Lockhart, Director Arkansas Department of Corrections, Appellant.	*	Appeal from the United States District Court for the Eastern District of Arkansas

Appellant's motion to recall the mandate has been considered by the court and is hereby granted. The clerk of the district court is hereby directed to return the previously issued mandate in this case to this court.

December 30, 1991

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 91-1393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A.L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION

PETITIONER

vs.

BOBBY RAY FRETWELL

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD R. MEDLOCK
1810 UNION NATIONAL PLAZA
124 WEST CAPITOL AVENUE
LITTLE ROCK, AR 72201
(501) 370-5024

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

WHETHER RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

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IN THE

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VS.

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Bobby Ray Fretwell, the respondent, opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas is reported as Fretwell v. Lockhart, 739 F. Supp. 1334 (E.D. Ark. 1990) (Petitioner's Appendix A-21). The opinion of the United States Court of Appeals for the Eighth Circuit is reported as Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991) (Petitioner's Appendix A-1).

JURISDICTION

The jurisdiction requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "...[A]nd to have the assistance of counsel for his defense...."

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "...[N]or shall any state deprive any person of life, liberty, or property, without due process of law;...."

STATEMENT

The facts of the case are stated fully in the decisions of the United States District Court (Petitioner's Appendix A-21), and the United States Court of Appeals for the Eighth Circuit (Petitioner's Appendix A-1).

ARGUMENT

The issue presented in this case is unique and is limited to the unusual facts of the case. Despite petitioner's claim that the Court is afforded herein an opportunity to provide guidance to lower courts in this area, the value of the case as such is minimal at best. No conflict with prior decisions of this or other courts is presented, the petitioner has not shown that there is pending litigation involving the same or a similar issue, and the decision of the court below is in full accord with principles expressed in decisions of this Court. For these reasons, review on certiorari is unwarranted.

The respondent herein was denied his Sixth Amendment right to the effective assistance of counsel at his capital-felony murder trial. In recognition of this deprivation, the Eighth Circuit Court of Appeals correctly applied the clear principles of Strickland v. Washington, 466 U.S. 668 (1984). Strickland defines ineffective assistance as counsel's deficient performance which results in prejudice to the Defendant. This two-prong test was met where respondent's trial counsel failed to make a motion which, had it been made, would have in all probability, resulted in respondent receiving a sentence of life without parole rather than a sentence of death.

The motion in question would have been one to preclude submission to the jury, at the sentencing phase of the trial, of the aggravating circumstance that the murder was committed for

pecuniary gain. As the petitioner correctly notes, under the rule of Collins v. Lockhart, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985), submission to the jury of pecuniary gain as an aggravating circumstance of a robbery/murder was, at the time of respondent's trial, an impermissible violation of the Eighth and Fourteenth Amendments. The violation occurred, Collins held, because using an aggravating circumstance to justify the imposition of death, which circumstance duplicated an element of the underlying offense, failed to narrow the class of death-eligible defendants to those who should get the death penalty. Collins was good law in the Eighth Circuit at the time of respondent's trial, and the fact that years later it was impliedly overruled does not, as the petitioner suggests, address itself to the analysis of respondent's ineffective assistance claim.

Strickland, supra, does address itself to this analysis, and provides all the guidance this Court or any other should need. The guidelines are clear:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.
>
> Id. at 689.
>
> Thus, a court deciding an actual ineffective claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.
>
> Id. at 690.

In August of 1985, the time of respondent's trial, Collins was the only case directly construing Arkansas' capital punishment statute which addressed the issue of "double-counting" of aggravating circumstances and elements of the underlying felony. The rule was clear that such "double-counting" was impermissable under the Eighth and Fourteenth Amendments. Trial counsel should have been aware of this and should have made the proper motion pursuant to Collins. Had he done so, there is no reason to believe that the trial court would have denied the motion. The result would have been that the respondent would have received a sentence of life without parole because no other aggravating circumstances were found justifying the imposition of the death sentence.

Petitioner's argument that the subsequent change in the law, (see Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), cert. denied, 493 U.S. 959 (1989), citing Lowenfield v. Phelps, 484 U.S. 231 (1988)), distinguishes this case to the point that certiorari should be granted ignores Strickland's admonition regarding the distorting effects of hindsight. The status of the law at the time of respondent's trial was clear. As the Eighth Circuit Court of Appeals noted, the respondent "was sentenced while Collins was good law, and was entitled to its benefits at the time of his sentencing." Fretwell v. Lockhart, 946 F.2d 571, 578 (8th Cir. 1991).

The Eighth Circuit also noted that, "[T]he district court found that the performance of Fretwell's trial counsel was

deficient because he was ignorant of Collins. Lockhart does not challenge this finding, nor do we." Id. at 574. Therefore, the only claim which the petitioner can make is that no prejudice resulted due to the deficiency, and his argument rests on the unlikely proposition that had the motion been timely made, the trial court would have denied it. In other words, that pecuniary gain as an aggravating circumstance would have been submitted to the jury despite the clear rule of Collins.

In support of his position, petitioner suggests that the trial court would have denied the Collins' motion in deference to Jurek v. Texas, 428 U.S. 262 (1976). This is a far reaching assumption in light of the fact that Jurek analyzed Texas' capital murder statute, whereas Collins focused directly on the Arkansas statute. Jurek does state that the "narrowing function" required of capital punishment statutes by the Eighth Amendment may be performed in either of two ways -- through legislative definition of the crime or by consideration of aggravating circumstances at the sentencing phase of a capital trial. Not until the Eighth Circuit's opinion in Perry v. Lockhart, 871 F.2d 1384, cert. denied, 110 S. Ct. 378 (1989), however, was the Jurek rule applied to the Arkansas statute. The law in the Eighth Circuit at time of respondent's trial was the rule of Collins, and there is no reason to assume that the trial court would have ignored it in favor of a strained application of the Jurek rule.

Petitioner's argument does nothing more than suggest an alternative analysis which could possibly have been used by the trial court to avoid the rule of Collins. This does not in any way suggest what the trial court most probably would have done, and under the present facts, an assessment of probability is the only way to satisfy the "prejudice" requirement of Strickland's two-prong test. To demonstrate that the respondent suffered no prejudice, the petitioner must prove that the trial court probably would have denied a Collins motion. No amount of speculation or rhetoric regarding what the court might have done can prove this point. Furthermore, it is obvious that without the benefit of the later decisions of Lowenfield and Perry, the court would have looked to Collins for guidance. Given that probability, the prejudice to Fretwell is obvious and of such gravity that the outcome of his trial would have been different but for it. Absent his counsel's omission, the court would not have permitted the jury to consider pecuniary gain as an aggravating circumstance, and he would not have been sentenced to death.

Finally, Respondent would point out that the only remedy which will remove the taint of prejudice in this case is to unconditionally reduce his sentence to life without parole. That is what he would have gotten but for his counsel's ineffective assistance. To permit the State of Arkansas to retry the sentencing phase of Fretwell's trial, as petitioner suggests, would perpetuate the prejudice he suffered at his original trial. There

is no reason to believe that the jury's findings on the sentencing issue would be different than they were in 1985. The only difference is that their findings would now be legal because the law has changed. Pecuniary gain could be, and undoubtedly would be, used as an aggravating circumstance, and the outcome would be the same. The respondent would receive a death sentence. Such a proceeding and result would mask the fundamental unfairness which occurred in respondent's trial. As stated by the Eighth Circuit, ". . . fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney's error." Fretwell v. Lockhart, at 577. This is what happened to Fretwell, and the only appropriate remedy is to leave undisturbed the Eighth Circuit's ruling.

CONCLUSION

For the reasons stated hereinabove, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BOBBY RAY FRETWELL, RESPONDENT

By: 

RICHARD R. MEDLOCK
COUNSEL FOR RESPONDENT
1810 UNION NATIONAL PLAZA
124 WEST CAPITAL AVENUE
LITTLE ROCK, AR 72201
(501) 370-5024

No. 91-1393

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

BOBBY RAY FRETWELL ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

WINSTON BRYANT, ESQ.*
ARKANSAS ATTORNEY GENERAL
CLINT MILLER, ESQ.*
SENIOR ASSISTANT ATTY. GENERAL
J. BRENT STANDRIDGE*
ASSISTANT ATTY. GENERAL
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

RICKY R. MEDLOCK, ESQ.*
Appointed By This Court
421 Main Street
P. O. Drawer 475
Arkadelphia, AR 71923
(501) 246-0303

*Counsel of Record

PETITION FOR CERTIORARI FILED ON MARCH 2, 1992.
CERTIORARI GRANTED ON MAY 18, 1992.

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No. 91-1393

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

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ON WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
Jan. 31, 1985	The United States Eighth Circuit Court of Appeals hands down its decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).
April 29, 1985	Respondent Fretwell robs and murders Sherman Sullins.
May 1, 1985	The State of Arkansas charges Fretwell with capital felony murder for the April 29, 1985 robbery-murder of Sherman Sullins.

Aug. 6-8, 1985 Respondent Fretwell stands trial in Searcy County Circuit Court for the capital felony offense of robbery-murder. The jury finds Fretwell guilty of capital felony murder and, in a separate penalty phase, sentences him to death.

May 19, 1986 The Arkansas Supreme Court affirms Fretwell's capital felony murder conviction and death sentence in *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986).

April 27, 1987 The Arkansas Supreme Court in *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987), denies Fretwell permission to seek post-conviction relief at the trial court level.

Jan. 13, 1988 This Court hands down its opinion in *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

April 10, 1989 The United States Eighth Circuit Court of Appeals hands down its opinion in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).

June 29, 1990 The United States District Court for the Eastern District of Arkansas hands down its memorandum opinion vacating Fretwell's death sentence and otherwise denying him habeas corpus relief in *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990).

Sept. 23, 1991 The United States Eighth Circuit Court of Appeals hands down its opinion affirming the district court's memorandum opinion in *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991).

Dec. 4, 1991 The United States Eighth Circuit Court of Appeals denies Lockhart's petition for rehearing and suggestion for rehearing *en banc* in *Fretwell v. Lockhart*, 946 F.2d 571.

March 2, 1992 Petitioner Lockhart dockets with this Court his petition for a writ of certiorari to the United States Eighth Circuit Court of Appeals.

May 18, 1992 This Court grants petitioner Lockhart's petition for a writ of certiorari to the United States Eighth Circuit Court of Appeals.

JURY INSTRUCTIONS GIVEN BY THE SEARCY COUNTY CIRCUIT COURT TO THE JURY AT THE PENALTY STAGE OF RESPONDENT FRETWELL'S CAPITAL FELONY MURDER TRIAL THAT WAS HELD ON AUGUST 6-8, 1985

[R. 25]

IN THE CIRCUIT COURT OF
SEARCY COUNTY, ARKANSAS

State of Arkansas ..... *Plaintiff*

Vs. No. CR 85-14

Bobby Ray Fretwell ..... *Defendant*

STATE'S JURY INSTRUCTION NO. _____
AMCI 1509

Members of the jury, you have found Bobby Ray Fretwell guilty of capital murder. After hearing arguments of counsel, you will again retire to deliberate and decide whether he is to be sentenced to death by electrocution or to life imprisonment without parole.

In determining which sentence shall be imposed, you may be required to make specific written findings as to the existence or absence of aggravating or mitigating circumstances. Appropriate forms will be provided for you, and I will now instruct you on the procedures that you must follow.

There are three forms for you to use in reaching your decision, and a verdict form for you to use when your verdict has been reached.

Form 1, which will be handed to you later, deals with aggravating circumstances. The appearance of any particular aggravating circumstance on the form does not mean that it actually existed in this case. These are specified by law and are the only aggravating circumstances that you may consider. The State has the burden of proving beyond a reasonable doubt that one or more of the listed aggravating circumstances existed at the time of the commission of the capital murder. If you find unanimously and beyond a reasonable doubt that one or more of these aggravating circumstances existed, then you will indicate your findings by checking the appropriate spaces on Form 1. If you do not unanimously find beyond a reasonable doubt the existence of any aggravating circumstance, then you will cease deliberations and indicate on the verdict form a sentence of life imprisonment without parole.

(File mark omitted in printing.)

[R. 26]

If you do unanimously find one or more aggravating circumstances, you should then complete Form 2, which deals with mitigating circumstances. Form 2 lists some factors that you may consider as mitigating circumstances. However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

Unlike an aggravating circumstance, you are not required to be confinced (sic) of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably existed.

Form 2 is made up of four parts. Part A is a list of mitigating circumstances to be checked only if you unanimously agree that a particular circumstance existed. Part B is a list to be checked where some of you think a circumstance existed, but all do not agree. Part C is a list to reflect circumstances of which there may have been some evidence but no member of the jury feels that the circumstances existed. The last Part D is to be checked only if the jury concludes that there is no evidence of mitigating circumstances.

After making the determinations required to complete Form 1 and Form 2, if applicable, you will then complete Form 3.

In no event will you return a verdict imposing the death penalty unless you unanimously make three particular written findings on Form 3. These are:

First: That one or more aggravating circumstances existed beyond a reasonable doubt;

Second: That such aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found to exist; and

Third: That the aggravating circumstances justify beyond a reasonable doubt the sentence of death.

If you make those findings you will impose the death penalty.

Otherwise you will sentence the defendant to life imprisonment without parole.

After you have made your determination of Forms 1 and 2 and have reflected your conclusions on Form 3, then you must check the appropriate verdict on Form 4. Each of you must sign the verdict form.

You may now retire to consider your decision.

(File mark omitted in printing.)

VERDICT FORMS FILLED OUT BY JURY IN THE PENALTY PHASE OF FRETWELL'S TRIAL

[R. 27]

IN THE CIRCUIT COURT OF
SEARCY COUNTY, ARKANSAS

State of Arkansas ..... *Plaintiff*

Vs. No. _____

Bobby Ray Fretwell ..... *Defendant*

Form 1

AGGRAVATING CIRCUMSTANCES

We, the jury, after careful deliberation, have unanimously determined that the following aggravating circumstance or circumstances existed beyond a reasonable doubt at the time of the commission of the capital murder:

( ) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody.

(X) The capital murder was committed for pecuniary gain.

/s/ W. E. Beaumont
FOREMAN

(File mark omitted in printing.)

[R. 28]

IN THE CIRCUIT COURT OF
SEARCY COUNTY, ARKANSAS

State of Arkansas ..... *Plaintiff*

Vs. No. CR 85-14

Bobby Ray Fretwell ..... *Defendant*

Form 2

MITIGATING CIRCUMSTANCES

A. ( ) WE UNANIMOUSLY FIND THAT THE FOLLOWING MITIGATING CIRCUMSTANCE PROBABLY EXISTED AT THE TIME OF THE MURDER:

(Check applicable circumstances and specify any additional ones.)

( ) The capital murder was committed while Bobby Ray Fretwell was under extreme mental or emotional disturbance.

( ) The capital murder was committed while Bobby Ray Fretwell was acting under unusual pressures or influences or under the domination of another person.

( ) The capital murder was committed while the capacity of Bobby Ray Fretwell to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

( ) The youth of Bobby Ray Fretwell at the time of the commission of the capital murder.

( ) The capital murder was committed by another person and Bobby Ray Fretwell was an accomplice and his participation relatively minor.

( ) Bobby Ray Fretwell has no significant history of prior criminal activity.

(File mark omitted in printing.)

[R. 31 (Misordered in record)]

( ) Other: Specify in writing. _____

B. ( ) One or more members of the jury believe that the following mitigating circumstances probably existed, but the jury did not unanimously agree:

( ) The capital murder was committed while Bobby Ray Fretwell was under extreme mental or emotional disturbance.

( ) The capital murder was committed while Bobby Ray Fretwell was acting under unusual pressures or influences or under the domination of another person.

( ) The capital murder was committed while the capacity of Bobby Ray Fretwell to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

( ) The youth of Bobby Ray Fretwell at the time of the commission of the capital murder.

( ) The capital murder was committed by another person and Bobby Ray Fretwell was an accomplice and his participation relatively minor.

( ) Bobby Ray Fretwell has no significant history of prior criminal activity.

( ) Other: Specify in writing. _____

(File mark omitted in printing.)

[R. 30 (Misordered in record)]

C. ( ) There was evidence of the following mitigating circumstances, but the jury unanimously agreed that they did not exist at the time of the murder.

( ) The capital murder was committed while Bobby Ray Fretwell was under extreme mental or emotional disturbance.

( ) The capital murder was committed while Bobby Ray Fretwell was acting under unusual pressures or influences or under the domination of another person.

( ) The capital murder was committed while the capacity of Bobby Ray Fretwell to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

( ) The youth of Bobby Ray Fretwell at the time of the commission of the capital murder.

( ) The capital murder was committed by another person and Bobby Ray Fretwell was an accomplice and his participation relatively minor.

( ) Bobby Ray Fretwell has no significant history of prior criminal activity.

( ) Other: Specify in writing. _____

D. (X) There was no evidence of any mitigating circumstance.

(Check if applicable.)

(File mark omitted in printing.)

[R. 29 (Misordered in record)]

Form 3

CONCLUSIONS

The Jury, having reached its final conclusions, will so indicate by having its Foreman place a check mark ( ) in the appropriate space in accordance with the Jury's findings. In order to check any space, your conclusions must be unanimous. The Foreman of the Jury will then sign at the end of this form.

WE THE JURY CONCLUDE:

(a) (X) One or more aggravating circumstances DID exist beyond a reasonable doubt, at the time of the commission of the capital murder.

(If you do not unanimously agree to check paragraph (a) then skip (b) and (c), and sentence Bobby Ray Fretwell to life imprisonment without parole on Form 4.)

(b) (X) The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances.

(If you do not unanimously agree to check paragraph (b) then skip (c), and sentence Bobby Ray Fretwell to life imprisonment without parole on Form 4.)

(c) (X) The aggravating circumstances justify beyond a reasonable doubt a sentence of death.

(If you do not unanimously agree to check paragraph (c), then sentence Bobby Ray Fretwell to life imprisonment without parole on Form 4.)

If you have checked paragraphs (a), (b) and (c) then sentence Bobby Ray Fretwell to death by electrocution on Form 4. Otherwise, sentence Bobby Ray Fretwell to life imprisonment without parole on Form 4.

/s/ W. E. Beaumont
FOREMAN

(File mark omitted in printing.)

[R. 33]

Form 4

VERDICT

We, the jury, after careful deliberation, have determined that Bobby Ray Fretwell shall be sentenced to:

A. ( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B. (X) DEATH BY ELECTROCUTION.

(Each juror must sign this verdict.)

s/W. E. Beaumont Foreman	s/Marvene Kyle
s/James F. Owens	s/Sandra F. Black
s/James R. Kelley	s/Glenda K. Grinder
s/Mary M. Anderson	s/Alva Dean Stills
s/Daniel E. Collins	s/Ronald Morrison
s/illegible	s/Gene Stinnett

(File mark omitted in printing.)

The United States District Court for the Eastern District of Arkansas' memorandum opinion of June 29, 1990, vacating respondent Fretwell's death sentence pursuant to 28 U.S.C. §2254 can be found in the appendix to petitioner Lockhart's petition for a writ of certiorari filed with this Court. The district court's memorandum opinion appears at A-21 to A-28 of this appendix.

The United States Eighth Circuit Court of Appeals' opinion of September 23, 1991, affirming the June 29, 1990 memorandum opinion of the United States District Court for the Eastern District of Arkansas can be found in the appendix to petitioner Lockhart's petition for a writ of certiorari filed with this Court. The Eighth Circuit's opinion appears at A-1 to A-20 of this appendix. The Eighth Circuit's judgment, issued after denial of rehearing, appears at A-29 of this appendix.

Respectfully submitted,

WINSTON BRYANT, ESQ.*
ARKANSAS ATTORNEY GENERAL
CLINT MILLER, ESQ.*
SENIOR ASSISTANT ATTY. GENERAL
J. BRENT STANDRIDGE*
ASSISTANT ATTY. GENERAL
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

RICKY R. MEDLOCK, ESQ.*
Appointed By This Court
421 Main Street
P.O. Drawer 475
Arkadelphia, AR 71923
(501) 246-0303

*Counsel of Record

No. 91-1393

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

VS.

BOBBY RAY FRETWELL ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

WINSTON BRYANT, ESQ.
ARKANSAS ATTORNEY GENERAL

BY: CLINT MILLER, ESQ.
SENIOR ASSISTANT ATTY. GENERAL
J. BRENT STANDRIDGE, ESQ.
ASSISTANT ATTY. GENERAL
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657
Counsel for Petitioner

QUESTION PRESENTED

WHETHER THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT FRETWELL WAS DENIED HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL FELONY MURDER TRIAL IN THAT HE SUFFERED PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE A "DOUBLE-COUNTING" OBJECTION, BASED ON THE EIGHTH CIRCUIT'S HOLDING IN *COLLINS V. LOCKHART*, 754 F.2d 258 (8TH CIR.), *CERT. DENIED*, 474 U.S. 1013 (1985), TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN IN LIGHT OF THE FACT THAT *COLLINS* HAD BEEN DECIDED CONTRARY TO THE JOINT OPINION OF THIS COURT IN *JUREK V. TEXAS*, 428 U.S. 262 (1976) AND WAS SUBSEQUENTLY OVERRULED BY THE EIGHTH CIRCUIT.

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No. 91-1393

IN THE

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OCTOBER TERM, 1991

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION..... *Petitioner*

vs.

BOBBY RAY FRETWELL .....*Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

A. L. Lockhart, Director, Arkansas Department of Correction, the petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reported as *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), and is reprinted in the appendix to petitioner Lockhart's petition in the instant case seeking a writ of certiorari from this Court. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990), and is reprinted in the appendix to petitioner Lockhart's petition in the instant case seeking a writ of certiorari from

this Court. The appendix of Lockhart's petition for certiorari also includes the Eighth Circuit's order denying petitioner Lockhart's petition for rehearing and suggestion for rehearing *en banc*, that was issued on December 4, 1991. The appendix of Lockhart's petition for certiorari also includes the Eighth Circuit's order recalling the mandate in the instant case, which was issued on December 30, 1991.

JURISDICTION

The Eighth Circuit Court of Appeals handed down its opinion in the instant case on September 23, 1991. This decision was rendered by a three-judge panel of the court. Petitioner Lockhart petitioned for rehearing and for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing *en banc* and the original three-judge panel denied Lockhart's petition for rehearing. Five judges for the Eighth Circuit Court of Appeals, Judges Fagg, Bowman, Wollman, Beam and Loken, voted to grant petitioner Fretwell's petition for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing *en banc* on December 4, 1991.

This Court has jurisdiction to review the instant case by writ of certiorari. This Court's jurisdiction to review the instant case by means of the writ of certiorari is set forth in 28 U.S.C. §1254(1). Lockhart filed his petition for a writ of certiorari in a timely manner on March 2, 1992. This Court granted petitioner Lockhart's petition seeking the issuance of a writ of certiorari to the United States Eighth Circuit Court of Appeals on May 18, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> ". . .[A]nd to have the assistance of counsel for his defense. . . ."

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> ". . .[N]or cruel and unusual punishments inflicted."

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

Arkansas Statute Annotated §41-1501(1)(a) (1977) states:

> "A person commits capital murder if:
>
> acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . ." [Arkansas Statute Annotated §41-1501(1)(a) is presently codified as Arkansas Code Annotated §5-10-101(a)(1) (Supp. 1991).]

Arkansas Statute Annotated §41-1303(6) (1977) states:

"[T]he capital murder was committed for pecuniary gain. . . ." [Arkansas Statute Annotated §41-1303(6) is presently codified as Arkansas Code Annotated §5-4-604(6) (Supp. 1991).]

Arkansas Statute Annotated §41-1302(1) (1977) states:

"[T]he jury shall impose a sentence of death if it unanimously returns written findings that:

> aggravating circumstances exist beyond a reasonable doubt; and
>
> aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and
>
> aggravating circumstances justify a sentence of death beyond a reasonable doubt. [Arkansas Statute Annotated §41-1302(1) is presently codified as Arkansas Code Annotated §5-4-603(a) (Supp. 1991).]

STATEMENT OF THE CASE

This case is before this Court on a petition for writ of certiorari, brought by petitioner A. L. Lockhart, Director, Arkansas Department of Correction, in which he asked this Court to review the decision of the United States Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). In *Fretwell v. Lockhart*, a three-judge panel of the Eighth Circuit Court of Appeals affirmed a memorandum order that had been entered by the United States District Court for the Eastern District of Arkansas, pursuant to 28 U.S.C. §2254(d), conditionally granting habeas corpus relief to respondent Bobby Ray Fretwell, a prisoner held on Death Row at the Tucker Unit of the Arkansas Department of Correction. The District Court below in *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990), vacated Fretwell's death sentence and conditioned reduction of Fretwell's sentence to life imprisonment without the possibility of parole on whether the State of Arkansas would agree to resentence Fretwell. [Such a "retrial" of only the penalty phase of a capital murder trial is permissible in Arkansas. *See* Ark. Code Ann. §5-4-616 (1987).] Both petitioner Lockhart and respondent Fretwell appealed the district court's memorandum order to the United States Eighth Circuit Court of Appeals.

The Eighth Circuit Court of Appeals handed down its opinion in *Fretwell v. Lockhart* on September 23, 1991. In its opinion, the Court of Appeals concluded that the relief that Fretwell was entitled to was not a "retrial" of the penalty phase of his capital felony murder trial, but prohibition of such a "retrial" and reduction of his death sentence to life imprisonment without possibility of parole. Petitioner Lockhart petitioned the three-judge panel for rehearing and

petitioned the *banc* of the Court of Appeals for rehearing. The *banc* of the court denied rehearing by a vote of five to five. After the *banc* of the Eighth Circuit Court of Appeals denied rehearing, petitioner Lockhart filed the instant petition for writ of certiorari with this Court to review the decision of the Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*.

At the state court level this case had begun in August of 1985, when Fretwell was tried on a charge of capital felony murder in Searcy County Circuit Court. In a trial bifurcated into a guilt/innocence phase and a penalty phase, a jury found Fretwell guilty of capital felony murder, as set forth in Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977) [presently codified as Ark. Code Ann. §5-10-101(a)(1) (Supp. 1991)]. The Searcy County jury found that on April 29, 1985, Fretwell had murdered a man named Sherman Sullins in the course of robbing him. [The particulars of Fretwell's robbery-murder of Sherman Sullins are set forth in detail by the district court in *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1335 (E.D. Ark. 1990), which is reprinted in the appendix of Lockhart's petition for a writ of certiorari at A-21 to A-28.] After the separate penalty phase of Fretwell's trial, the jury sentenced him to death. (J.A. 12) The state trial court, the Searcy County Circuit Court, had instructed the jury on two aggravating circumstances, "murder committed for the purpose of avoiding or preventing an arrest" and "murder committed for pecuniary gain."[1] (J.A. 7) The jury found only "murder committed for pecuniary gain" as an aggravating circumstance. (J.A. 11) The jury found no mitigating circumstances. (J.A. 11) Fretwell's trial counsel had failed to object to the submission to the jury of the aggravating circumstance of

[1]The "avoiding or preventing an arrest" aggravating circumstance is presently codified as Ark. Code Ann. §5-4-604(5) (Supp. 1991). The "pecuniary gain" aggravating circumstance is presently codified as Ark. Code Ann. §5-4-604(6) (Supp. 1991).

"murder committed for pecuniary gain" despite the fact that just over six months earlier, on January 31, 1985, the United States Eighth Circuit Court of Appeals had handed down *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). In *Collins* the Eighth Circuit Court of Appeals had held that the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment prohibits the use of "pecuniary gain" as an aggravating circumstance in capital felony murder trials where robbery-murder is the capital offense at issue.

Fretwell directly appealed his conviction and death sentence to the Arkansas Supreme Court. The Arkansas Supreme Court affirmed in *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Subsequently, Fretwell petitioned the Arkansas Supreme Court for permission to seek post-conviction relief in Searcy County Circuit Court. Fretwell filed this petition pursuant to Arkansas Rule of Criminal Procedure 37.2(a). The Arkansas Supreme Court denied Fretwell's petition requesting permission to seek post-conviction relief in *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987). Subsequently, Fretwell attacked the validity of his capital felony murder conviction and death sentence by filing a petition seeking habeas corpus relief pursuant to 28 U.S.C. §2254(d) with the United States District Court for the Eastern District of Arkansas. The results of Fretwell's habeas corpus petition to the District Court for the Eastern District of Arkansas and the resulting appeal to the United States Eighth Circuit Court of Appeals have been noted above.

In deciding the instant case, the United States Eighth Circuit Court of Appeals concluded that Fretwell had suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial. Specifically, the

Court of Appeals determined that Fretwell's trial counsel was ineffective in that he failed to make a particular objection. The Court of Appeals concluded that Fretwell's trial counsel was ineffective because he had failed to object at the penalty phase of Fretwell's capital murder trial to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain." According to the Court of Appeals' analysis, Fretwell's trial counsel should have objected to the submission of this aggravating circumstance on the basis of the Court of Appeals' prior decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). *Collins v. Lockhart* held that the Fourteenth and Eighth Amendments' prohibition against cruel and unusual punishment prohibits a state from the use of pecuniary gain as an aggravating circumstance in capital felony murder cases where the predicate felony for the murder charge is robbery. According to the Eighth Circuit Court of Appeals in *Collins*, the Eighth Amendment prohibits the use of pecuniary gain as an aggravating circumstance in robbery-murder capital felony murder trials because pecuniary gain duplicates an element of robbery and, therefore, does not genuinely narrow the class of robbery-murderers into a subclass of robbery-murderers that truely deserves the penalty of death.

According to the Court of Appeals in the instant case, had Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain," the state trial court would have followed the rationale of *Collins v. Lockhart* and would not have submitted this aggravating circumstance to the jury. According to the Court of Appeals, had the state trial court not submitted to the jury the aggravating circumstance of "murder committed for pecuniary gain," the jury would have acquitted Fretwell of the

death penalty. Although the Court of Appeals does not say so in so many words, apparently it reached this conclusion because, as a matter of what *did* happen at Fretwell's trial, the jury did not find the other aggravating circumstance that had been submitted to it. (J.A. 7) Also, the Court of Appeals concluded that the only relief permitted by the writ of habeas corpus that would remedy Fretwell's deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial was prohibition of any effort by the State of Arkansas to retry the penalty phase of Fretwell's capital felony murder trial and reduction of his death sentence to the only other possible sentence, that being life imprisonment without possibility of parole. It is the decision by the United States Eighth Circuit Court of Appeals in *Fretwell v. Lockhart, supra*, that Fretwell was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial that petitioner Lockhart asks this Court to reverse.

Petitioner Lockhart's petition requesting the issuance of a writ of certiorari was docketed in this Court on March 2, 1992. This Court granted Lockhart's petition requesting the issuance of a writ of certiorari on May 18, 1992.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Eighth Circuit Court of Appeals in the instant case that affirmed the district court's decision, on habeas corpus review conducted pursuant to 28 U.S.C. §2254(d), to vacate respondent Fretwell's death sentence. The Court of Appeals affirmed the district court's conclusion that Fretwell suffered prejudice — the imposition of the death penalty — because of his trial counsel's ineffective assistance at the penalty phase of Fretwell's bifurcated capital felony murder trial in Searcy County Circuit Court in August of 1985. The Court of Appeals concluded that had Fretwell's trial counsel made an objection to the submission to the jury of the aggravating circumstance of pecuniary gain on the basis of the court's "double-counting" holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), the Searcy County Circuit Court would have been required to follow *Collins v. Lockhart* and would not have instructed the jury on the aggravating circumstance of pecuniary gain in the penalty phase of Fretwell's capital felony murder trial. The Court of Appeals concluded that the Searcy County Circuit Court would have been required to follow its decision in *Collins v. Lockhart* on the basis of the Supremacy Clause. *Fretwell v. Lockhart*, 946 F.2d at 577. The Court of Appeals erred in concluding that Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

Claims of ineffective assistance of trial counsel that are based on counsel's deficient performance are governed by the standards set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland* this Court set forth

a two-pronged analysis that courts are to employ in evaluating claims of ineffective assistance of trial counsel that are based on counsel's deficient performance. In order to determine whether counsel was ineffective, this Court stated in *Strickland* that courts are to review counsel's performance and are also to determine whether the defendant suffered any prejudice as a result of counsel's performance. This Court also held in *Strickland* that defense counsel's role is to adversarially test the strength of the State's proof of the defendant's guilt in order to ensure that the defendant receives a fair trial and that the result of the defendant's trial is a reliable verdict. *Strickland*, 466 U.S. at 684-87. Moreover, this Court stated in *Strickland* that in order to show prejudice a defendant ". . . must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In *Strickland* this Court also held:

> A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for

example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Id. at 695.

In 1986 this Court further developed the prejudice prong of *Strickland* analysis of ineffective assistance of counsel claims based on counsel's deficient performance in the cases of *Nix v. Whiteside*, 475 U.S. 157 and *Kimmelman v. Morrison*, 477 U.S. 365. In *Nix v. Whiteside* this Court held that respondent Whiteside's trial counsel was not ineffective when he persuaded Whiteside not to take the stand and present perjured testimony in his own defense. Whiteside's trial counsel persuaded him not to do so by threatening to inform the trial court if Whiteside committed perjury and also by stating that he would withdraw from the case if Whiteside did so. In deciding that Whiteside's trial court was not ineffective this Court cited *Strickland v. Washington* and noted that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Nix*, 475 U.S. at 175. This Court held that Nix suffered no prejudice because confidence in the result of the jury's verdict that he was guilty of second degree murder was not diminished by the absence of his perjured testimony.

In *Kimmelman v. Morrison* this Court held that claims of ineffective assistance of counsel that are based on counsel's failure to move to suppress allegedly illegally seized evidence are not barred from habeas corpus review by federal courts by *Stone v. Powell*, 428 U.S. 465 (1976). In holding that such claims of ineffective assistance of counsel are not barred from review by *Stone v. Powell*, this Court reaffirmed its holding in *Strickland v. Washington* that defense counsel insures that the defendant receives a fair trial, and that the result of the defendant's fair trial is a reliable verdict, by adversarially testing the State's proof of the defendant's guilt. *Kimmelman*,

477 U.S. at 374. Moreover, in *Kimmelman v. Morrison*, this Court stated that its refusal to extend its holding in *Stone v. Powell* to bar federal court review of ineffective assistance of counsel claims based on counsel's failure to move to suppress allegedly illegally seized evidence would not become an exception that would swallow *Stone v. Powell* because the standard of ineffective assistance of counsel set forth in *Strickland v. Washington* was "rigorous" and "highly demanding." *Id.* at 381, 382. In addition, this Court stated that whether a defendant suffered any prejudice from counsel's deficient performance could be evaluated by hindsight consideration of the relative importance of the components of the State's proof of the defendant's guilt. *Id.* at 386-87.

In addition to the majority opinion in *Kimmelman v. Morrison*, Justice Powell wrote a concurring opinion, which was joined by Chief Justice Burger and then Associate Justice Rehnquist. Justice Powell stated that a defendant could never satisfy the prejudice prong of *Strickland v. Washington* by complaining that his trial counsel failed to move to suppress allegedly illegally seized evidence. Justice Powell rested this conclusion on several of this Court's precedents that state that illegally seized evidence is typically highly probative of the defendant's guilt. Justice Powell also relied on this Court's decisions holding that the purpose of the right to counsel is to enable the defendant to adversarially test the strength of the state's proof of his guilt in order to promote the ultimate objective of the trial, which is that the guilty are convicted and the innocent go free. With regard to this premise, Justice Powell wrote, "The right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." *Id.* at 365.

Fretwell's claim that his trial counsel was ineffective rests on his counsel's failure to object at the penalty phase of Fretwell's capital felony murder trial to the submission to the jury of the aggravating circumstance of pecuniary gain. According to Fretwell, his trial counsel should have objected to the submission to the jury of the aggravating circumstance of pecuniary gain on the basis of the Eighth Circuit Court of Appeals' decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). The Court of Appeals had handed down its decision in *Collins v. Lockhart* just over six months prior to Fretwell's trial in Searcy County Circuit Court. Prior to the Eighth Circuit Court of Appeals' review of Fretwell's case, that court overruled *Collins v. Lockhart* in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989). The Court of Appeals overruled *Collins v. Lockhart* in *Perry v. Lockhart* in 1989 on the basis of this Court's 1988 decision in *Lowenfield v. Phelps*, 484 U.S. 231. In *Lowenfield v. Phelps* this Court did nothing more than apply its joint opinion in *Jurek v. Texas*, 428 U.S. 262. This Court decide *Jurek v. Texas* in 1976, which was nine years before Fretwell stood trial in Searcy County Circuit Court.

The Eighth Circuit Court of Appeals erred in concluding that Fretwell suffered the prejudice of the imposition of the death penalty as a result of his trial counsel's failure to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain. As measured by the standard of prejudice set forth by Justice Powell's concurring opinion in *Kimmelman v. Morrison*, the Court of Appeals' decision gave Fretwell a windfall. The windfall nature of the Court of Appeals' decision is apparent, given that *Collins v. Lockhart* was incorrectly decided in the first instance and had been overruled by the Eighth Circuit itself by the time it reviewed Fretwell's case.

Also, the Court of Appeals' conclusion that Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection is erroneous when measured by the standard of prejudice this Court set forth in *Strickland v. Washington*. The lack of prejudice to Fretwell becomes apparent when the situation at his trial is compared with that of hypothetical defendants similarly situated whose hypothetical trial counsel *did* adversarially test the strength of the State's case. Each of these hypothetical situations assumes that counsel did make a *Collins v. Lockhart*-based "double-counting" objection and assumes further that the state trial court was bound to follow a hypothetical version of the *Collins v. Lockhart* decision that had been decided earlier by the Arkansas Supreme Court. Each assumes further that by the time each hypothetical verdict and sentence is reviewed on direct appeal by the Arkansas Supreme Court that court's hypothetical *Collins v. Lockhart* decision has been overruled by this Court's decision in *Lowenfield v. Phelps, supra.*

One of these hypothetical scenarios consists of counsel making a *Collins v. Lockhart* objection, the trial court sustaining the objection and the jury sentencing the defendant to death anyway. Had this hypothetical situation come to pass, the State would win the *Collins v. Lockhart* issue on the merits on its cross-appeal and the defendant would have suffered no prejudice because the jury's decision to sentence him to death would not have been affected by the aggravating circumstance of pecuniary gain because the jury did not consider it. In two other hypothetical situations the defendant loses the *Collins v. Lockhart* issue on its merits before the Arkansas Supreme Court when he directly appeals. The defendant would lose on the merits if his trial counsel makes a *Collins v. Lockhart* objection, the trial court denies the objection and the jury sentences the defendant to death. The defendant would also

lose the *Collins v. Lockhart* issue on its merits (assuming that he directly appealed the *Collins v. Lockhart* issue) if his trial counsel makes a *Collins v. Lockhart* objection, the trial court denies the objection but the jury votes not to sentence the defendant to death. The fourth possible hypothetical situation that could have occurred had trial counsel made a *Collins v. Lockhart* objection would have come to pass if trial counsel makes the objection, the trial court sustains the objection and the jury votes not to sentence the defendant to death. This hypothetical scenario is identical to the Eighth Circuit Court of Appeals' disposition of the instant case. Had this hypothetical scenario come to pass, former jeopardy considerations would prohibit the State from attempting to retry the penalty phase of Fretwell's trial.

The Eighth Circuit Court of Appeals erred in deciding this case as if the fourth hypothetical situation had occurred. The Court of Appeals disposed of the instant case by making unstated assumptions about the "actual process of decision" that the jury would have gone through had Fretwell's counsel made a *Collins v. Lockhart*-based "double-counting" objection that the trial court would have sustained. The Court of Appeals' unstated assumptions amount to guessing that if Fretwell's jury had before it only the aggravating circumstance of murder committed to avoid or prevent an arrest, the jury would not have found this aggravating circumstance, which is what the jury did, in fact, do when it actually deliberated in the penalty phase of Fretwell's trial. (J.A. 7) Of course, when the jury actually deliberated in the penalty phase of Fretwell's trial, it found the aggravating circumstance of pecuniary gain. (J.A. 7) The Court of Appeals erred in making these unstated assumptions about the jury's hypothetical "actual process of decision" because this Court held in *Strickland v. Washington* that in evaluating claims of

ineffective assistance of counsel courts should not consider the "actual process of decision" if it is not part of the record. *Strickland v. Washington*, 466 U.S. at 695. Of course, the jury's actual deliberations are not part of the record in the instant case, much less any set of hypothetical deliberations.

In addition, the guesswork that the Court of Appeals did in reaching the conclusion that Fretwell suffered prejudice from his trial counsel's failure to make a *Collins v. Lockhart*-based "double-counting" objection is also contrary to the analysis that this Court employs in reviewing claims of error that arise in inconsistent verdict cases. In *United States v. Powell*, 469 U.S. 57 (1984) this Court held that, for among other reasons, claims of inconsistent verdicts should not result in reversal and dismissal because individualized assessment of guilty verdicts that are inconsistent with verdicts of not guilty rendered in the same trial ". . . would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.

If this Court should determine that the Eighth Circuit Court of Appeals was correct in concluding that Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, petitioner Lockhart submits that the Court of Appeals erred in barring the State from retrying the penalty phase of Fretwell's capital felony murder trial. The Court of Appeals erred in this regard because when federal courts issue the writ of habeas corpus they limit the remedy of prohibition of retrial only to those situations where the defendant should never have been brought to trial in the first place. Deprivation of a defendant's Sixth Amendment right to the effective

assistance of counsel does not call into question the ability of the state to bring the defendant to trial in the first place. In effect, the Court of Appeals reduced Fretwell's death sentence to life imprisonment without possibility of parole. Federal courts conducting habeas corpus review of death sentences imposed in state criminal trials have no authority to reduce a death sentence to a lesser sentence on the basis of claims of ineffective assistance of counsel. *Duhamel v. Collins*, 955 F.2d 962, 968 (5th Cir. 1992).

ARGUMENT

I.

THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN VACATING RESPONDENT FRETWELL'S DEATH PENALTY ON THE BASIS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MAKE A "DOUBLE-COUNTING" OBJECTION TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN BECAUSE FRETWELL SUFFERED NO PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE SUCH AN OBJECTION, GIVEN THAT THE OBJECTION WOULD HAVE BEEN BASED ON PERSUASIVE CASE AUTHORITY WAS INCORRECTLY DECIDED AND WAS SUBSEQUENTLY OVERRULED.

A. *Introduction.*

This case gives this Court the opportunity to determine whether a defendant sentenced to death in a criminal case is deprived of the effective assistance of counsel when the defendant argues that he suffered from prejudice because of trial counsel's failure to make an objection on the basis of binding or persuasive case authority that was subsequently overruled. In these types of ineffective assistance of counsel cases three principles of constitutional law collide. These three principles are: (1) the Eighth Amendment's requirement that death sentences not be imposed in a manner that is arbitrary and capricious; (2) the Sixth Amendment principle, set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), that a defendant's claim of prejudice owing to ineffective assistance of counsel is not to turn on ". . . the luck of a lawless decisionmaker"; and (3) this Court's

practice of applying fully retroactively decisions on procedural or evidentiary issues in criminal or habeas corpus cases that reject claims of deprivation of rights guaranteed by the United States Constitution. Petitioner Lockhart respectfully submits that the United States Eighth Circuit Court of Appeals' resolution of the collision of these three principles in the instant case was wrong.

Because the Court of Appeals erred in this regard it erroneously concluded that Fretwell suffered prejudice when his trial counsel failed to make a "double-counting" objection, based on the court's holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), to the submission to the jury of the aggravating circumstance of pecuniary gain in the penalty phase of Fretwell's capital felony murder trial. The prejudice that the Court of Appeals erroneously concluded Fretwell suffered was the imposition of the death penalty and, therefore, it vacated his death sentence. Lockhart submits that Fretwell suffered no prejudice when his counsel failed to make a *Collins*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain and that when the Eighth Circuit Court of Appeals vacated his death sentence Fretwell reaped a "constitutional windfall" not commanded by the Sixth Amendment's guarantee of the right to effective assistance of trial counsel.[2]

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[2]The due process clause of the Fourteenth Amendment incorporates the Sixth Amendment's guarantee of the assistance of counsel to defendants accused of felony offenses. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to the assistance of counsel includes the right to the effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654 (1984).

B. *The prejudice prong of ineffective assistance of counsel analysis.*

Petitioner Lockhart submits that the Eighth Circuit Court of Appeals erred in concluding that Fretwell suffered any prejudice at the penalty phase of his capital felony murder trial. In order to demonstrate the nature of the Court of Appeals' erroneous conclusion in this regard it is necessary to review the concept of "prejudice" as explained by this Court in its landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, notably *Nix v. Whiteside*, 475 U.S. 157 (1986) and *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

1. *Strickland v. Washington, 466 U.S. 668 (1984).*

Analysis of claims of ineffective assistance of counsel that are based on counsel's deficient performance must begin with this Court's landmark decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland v. Washington*, respondent David Washington asserted that his trial counsel was ineffective at the penalty phase of his capital murder trial in that he had failed to offer mitigating evidence establishing Washington's good character and his "chronically frustrated and depressed" emotional state. In a majority opinion written by Justice O'Connor this Court concluded that Washington's counsel had not been ineffective at the penalty phase of Washington's capital murder trial and, in so concluding, this Court set forth the analytical framework that courts are to follow in evaluating claims of ineffective assistance of counsel that are based on counsel's deficient performance.[3]

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[3]Like *Strickland v. Washington*, the instant case presents a claim of ineffective assistance of counsel that is based on counsel's deficient performance, as opposed to counsel's absence or the actual or constructive

The analytical tool that this Court constructed in *Strickland v. Washington* to analyze claims of ineffective assistance of counsel based on allegations of deficient performance has two prongs: performance and prejudice. In setting forth this two-pronged analysis that courts are to follow in evaluating claims of ineffective assistance of counsel this Court stressed that practical considerations were important. This Court stated:

> Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696. As for the two-pronged standard itself, this Court held:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

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[3]*Continued*
denial of counsel or interference by the state with counsel's efforts to represent the accused during a critical stage of the proceedings. *See generally United States v. Cronic*, 466 U.S. 648, 659-662 (1984).

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In establishing this two-pronged analysis of ineffective assistance of counsel claims this Court placed great weight on the adversarial position that defense counsel takes in his client's behalf in a criminal trial. According to this Court in *Strickland v. Washington* it is defense counsel's adversarial testing of the state's proof of the defendant's guilt that insures that the defendant has a fair trial. *Id.* at 685-87. With regard to determining whether counsel's performance was sufficiently adversarial so that counsel ". . . was . . . functioning as the 'counsel' " guaranteed the defendant by the Sixth Amendment this Court was very careful to state that counsel's performance should not be evaluated merely on the basis of hindsight and that a court reviewing counsel's performance should ". . . reconstruct the circumstances of counsel's challenged conduct, and . . . evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 690.

With regard to the prejudice prong of its analysis, this Court stated that the defendant has the burden to prove prejudice resulting from his counsel's alleged deficient performance. *Id.* at 693. To specify the precise burden that a defendant must carry in order to prove the requisite prejudice, this Court drew on its precedents having to do with whether a defendant was denied his right to due process of law when the government failed to disclose exculpatory information

and set forth the following standard for the showing of prejudice:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. With regard to the defendant's effort to demonstrate prejudice, this Court noted that there were certain presumptions that should be made by and certain factors that should not be considered by a court reviewing a claim of ineffective assistance of counsel. This Court stated:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the

> prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Id. at 694-95. This Court noted further that in determining whether a defendant suffered prejudice as a result of his counsel's alleged deficient performance, a court should consider the totality of the state's evidence in order to determine the manner, if at all, the findings made by the trier of fact were affected by counsel's deficient performance. *Id.* at 695-96. This Court also noted that verdicts or other conclusions of fact that were supported by overwhelming evidence were less likely to present situations where the defendant suffered prejudice than verdicts or conclusions of fact for which there was weak support in the record. *Id.* at 696. With regard to situations, like the instant case, where the defendant claims that the prejudice he suffered as a result of counsel's deficient performance was the imposition on him of the death penalty, this Court stated:

> When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

This Court handed down its decision in *Strickland v. Washington*, on May 14, 1984. On that same day this Court handed down another ineffective assistance of counsel decision that elaborates on the primacy of defense counsel's adversarial testing of the state's proof of the defendant's

guilt as that which assures that the defendant receives a fair trial. This case is *United States v. Cronic*, 466 U.S. 648 (1984). In *United States v. Cronic* this Court held that a defendant could not prove that his trial counsel was ineffective merely by pointing to certain factors such as counsel's lack of experience and lack of time to prepare for trial and then by asking a reviewing court to infer that trial counsel was effective. In the course of so holding this Court stated (internal citations and footnotes omitted):

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives effective assistance of counsel, "a serious risk of injustice infects the trial itself."
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 655-56. In *United States v. Cronic*, this Court again stated that the defendant has the burden to prove that his counsel was ineffective. *Id.* at 658. Without question, both *Strickland v. Washington* and *United States v. Cronic* rest on the time-honored assumption that it is defense counsel's adversarial testing of the state's proof of the defendant's guilt that guarantees the defendant a fair trial, which, in turn, guarantees that the truth will emerge.

2. *Nix v. Whiteside, 475 U.S. 157 (1986).*

In 1986 this Court further elaborated the analytical tool of "prejudice" for Sixth Amendment ineffective assistance of counsel claims that it had introduced in *Strickland v. Washington* two years earlier. In *Nix v. Whiteside*, 475 U.S. 157, in a majority opinion written by Chief Justice Burger, this Court held that respondent Whiteside's trial counsel was not ineffective when he successfully discouraged Whiteside from giving perjured testimony in his own defense.

Whiteside had been charged with murder. He wanted to bolster a defense of self-defense by testifying that he had seen a gun, or at least "something metallic," in the victim's hand just before he stabbed the victim to death. However, prior to trial, Whiteside had consistently told his trial counsel that he had not actually seen a gun in the victim's hand. *Nix v. Whiteside*, 475 U.S. at 160-61. When Whiteside first told his trial counsel that he had seen "something metallic" in the victim's hand, trial counsel questioned him on this point and Whiteside replied, "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." *Id.* at 161. At this time Whiteside's trial counsel discouraged him from taking the

stand and lying in his own defense by telling him that if he did so he would inform the trial court that he believed Whiteside was perjuring himself and he would also withdraw from representing Whiteside. *Id.* at 161.

Whiteside did testify in his own defense at his trial. He testified on direct examination that he believed the victim had a gun and was reaching for it and, in order to protect himself, he stabbed the victim. On cross-examination Whiteside admitted that he had not seen a gun in the victim's hand.

The jury apparently did not believe Whiteside's testimony because it convicted him of second degree murder. Whiteside unsuccessfully sought relief in the state court system and, pursuant to the writ of habeas corpus, at the federal district court level. Whiteside appealed the federal district court's denial of his petition for a writ of habeas corpus to the United States Eighth Circuit Court of Appeals.

Whiteside successfully argued before the Court of Appeals that his trial counsel's threat to inform the trial court if he committed perjury amounted to ineffective assistance of counsel as measured by the standard set forth by this Court in *Strickland v. Washington*. The Court of Appeals concluded that the prejudice prong of *Strickland v. Washington* standard ". . . was satisfied by an implication of prejudice from the conflict between [trial counsel's] duty of loyalty to his client and his ethical duties." *Id.* at 163.

This Court reversed the Eighth Circuit's decision that Whiteside's counsel had performed ineffectively. This Court applied the standard it had set forth in *Strickland v. Washington* and concluded that Whiteside's counsel's performance had not been deficient and that Whiteside had

suffered no prejudice. With regard to the prejudice prong, both the majority opinion and a concurring opinion written by Justice Blackmun, which Justices Brennan, Marshall and Stevens joined, emphasized the point first set forth in *Strickland v. Washington* that a defendant's right to the effective assistance of counsel was of primary importance because it led to a reliable result, that is, a result that was consistent with the truth.[4] The prejudice analysis of both the majority opinion and Justice Blackmun's concurring opinion turned on the absence of a constitutional right to present false testimony in one's own defense. *Id.* at 173-74, 185-86. The majority opinion stated (internal citations omitted):

> We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the Strickland inquiry. . . . According to *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." The Strickland Court noted that the "benchmark" of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, "[a] defendant has no entitlement to the luck of a lawless decisionmaker."
>
> Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his

[4]Justice Brennan and Justice Stevens each wrote a separate concurring opinion in which each one indicated that respondent Whiteside had failed to demonstrate any prejudice. *Id.* at 176-77; 190-91.

perjury, it does not follow that Whiteside was prejudiced.

Id. at 175. For the concurring Justices, Justice Blackmun wrote (internal citations and footnotes omitted):

> The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.
>
> It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants. . . . But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.

Id. at 185-86. With regard to the issue before the Court in the instant case, petitioner Lockhart notes that both the majority opinion in *Nix v. Whiteside* and Justice Blackmun's concurring opinion placed particular emphasis on *Strickland v. Washington*'s holding that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.* at 175, 185. Given the facts of *Nix v. Whiteside*, the reference of both opinions

to the "lawless decisionmaker" holding of *Strickland v. Washington* leads inevitably to the conclusion that, for purposes of determining whether trial counsel was ineffective based on an allegation of deficient performance, a defendant has no right to a verdict based on that which is demonstrably false. In *Nix v. Whiteside* that which was false was the perjured testimony that Whiteside intended to give in his own defense.

3. *Kimmelman v. Morrison, 477 U.S. 365 (1986).*

This Court again discussed the prejudice prong of *Strickland v. Washington* analysis in 1986 in *Kimmelman v. Morrison*, 477 U.S. 365. *Kimmelman v. Morrison* involved a claim of ineffective assistance of trial counsel that was based on counsel's failure to make a timely motion to suppress certain evidence on the basis that it had been illegally seized. The State of New Jersey had accused Morrison of taking a fifteen-year-old girl to his apartment, forcing her on his bed there and raping her. The victim was an employee of Morrison's and he apparently let her return home after having raped her. The girl informed her mother of what had happened and she summoned the police. A few hours after the rape a police officer accompanied the victim to Morrison's apartment. Morrison was not in, but another tenant in the apartment building let them into Morrison's apartment. Once inside the apartment, the police officer, who did not have a search warrant, seized a sheet from Morrison's bed. This sheet was stained with semen and had human hair on it.

At trial, Morrison's trial counsel moved to suppress the bedsheet from admittance into evidence because it had been illegally seized. The trial court ruled that the motion to suppress was untimely. Defense counsel explained that he had not moved to suppress the bedsheet prior to trial because he

had only found out the day before that the police had seized the bedsheet. Trial/counsel was unaware that the police had seized the bedsheet because he had not requested any discovery. Defense counsel had erroneously believed that it was the State's obligation to discover its case to him even though he had not asked the State to do so.

The introduction of the bedsheet formed the basis for the testimony of a number of expert witnesses for the State. These witnesses had performed laboratory tests on the bedsheet and on other evidence, including the victim's underpants and on hair and blood samples provided by the victim and Morrison. These experts testified:

> . . . that the bedsheet had been stained with semen from a man with type O blood, that the stains on the victim's underwear similarly exhibited semen from a man with type O blood, that the defendant had type O blood, that vaginal tests performed on the girl at the hospital demonstrated the presence of sperm, and that hairs recovered from the sheet were morphologically similar to head hair of both Morrison and the victim.

Id. at 370.

Defense counsel vigorously cross-examined the expert witnesses. Defense counsel also called four witnesses to establish that the victim's accusation against Morrison was a lie that she made up because he had been late in paying her wages to her. Morrison himself testified and explained away the semen stain on the bedsheet as the result of intercourse with other women. He also explained that he had taken the victim to his apartment but that he had not raped her. This, according to Morrison, explained why a hair from the victim's head was found on the bedsheet. Morrison explained that,

while in his apartment, the victim had sat down on the bed. Despite defense counsel's efforts and his own testimony and that of his witnesses, Morrison was found guilty by the trial court.

The precise issue before this Court in *Kimmelman v. Morrison* was whether to extend the Court's holding in *Stone v. Powell*, 428 U.S. 465 (1976) to claims of ineffective assistance of counsel that were based on counsel's failure to move to suppress allegedly illegally seized evidence. In *Stone v. Powell* this Court had held, in essence, that claims by defendants in state court trials that they had been convicted on the basis of evidence that was seized in violation of their Fourth Amendment right to be free of unreasonable searches and seizures were not cognizable in petitions for habeas corpus relief brought pursuant to 28 U.S.C. §2254(d). In *Kimmelman v. Morrison* this Court refused to so extend *Stone v. Powell* to claims of ineffective assistance of counsel based on failure to move to suppress allegedly illegally seized evidence.

Much of this Court's opinion in *Kimmelman v. Morrison* explains the differences between the Sixth Amendment right to counsel and the judicially created exclusionary remedy for violations of the Fourth Amendment right to be free of unreasonable searches and seizures. In the course of this explanation this Court cited *Strickland v. Washington* and stated, "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Id.* at 374. Moreover, in the course of this explanation, this Court was very careful to note that where a defendant claims that his trial counsel was ineffective because he failed to move to

suppress allegedly illegally seized evidence, the defendant, in order to establish the prejudice required by *Strickland v. Washington*, would have to establish that his Fourth Amendment claim was meritorious and would also have to show ". . . that there is a reasonable probability that the verdict would have been different absent the excludable evidence. . . ." *Id.* at 375.

The potential merits of a defendant's underlying Fourth Amendment claim received special analytical attention from this Court in *Kimmelman v. Morrison* because the petitioners had argued that such claims, even if meritorious, could not possibly meet the prejudice prong of *Strickland v. Washington* because the exclusionary rule excludes evidence solely on the basis that it was illegally seized and takes no regard of the great probative value that such evidence typically has. This Court flatly rejected the petitioners' interpretation of the prejudice prong of *Strickland v. Washington*. This Court held (internal citations and footnotes omitted):

> While we have recognized that the " 'premise of our adversary system of criminal justice . . . that partisan advocacy . . . will thus promote the ultimate objective that the guilty be convicted and innocent go free,' " underlies and gives meaning to the right to effective assistance, we have never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.

Id. at 380.

This Court also rejected another argument advanced by petitioners to the effect that if *Stone v. Powell* were not extended to claims of ineffective assistance of counsel based on counsel's failure to move to suppress allegedly illegally seized evidence, then such a large exception to the rule of *Stone v. Powell* would be opened up that it would simply disappear. This Court rejected this argument by noting that the standard set forth in *Strickland v. Washington* for claims of ineffective assistance of counsel was "rigorous" and "highly demanding." *Id.* at 381, 382.

Petitioners also argued that respondent Morrison had not shown that his trial counsel's performance was deficient. This Court also rejected this argument and did so, in part, because the petitioners argued that the evidence that Morrison's counsel should have moved to suppress — the bedsheet and a semen stain and hairs recovered from the sheet itself — were not as crucial to the state's proof of Morrison's guilt as to testimony of the victim, whom Morrison's trial counsel vigorously cross-examined and attempted to discredit. This Court rejected the petitioners' effort to shore up Morrison's counsel's performance by showing that he had vigorously attacked the most probative parts of the State's proof of his guilt because this argument depended on a hindsight evaluation of the relative strength of the different pieces of evidence that the state used to prove Morrison's guilt. In rejecting this argument this Court stated (internal citations omitted):

> Moreover, petitioners' analysis is flawed, however, by their use of hindsight to evaluate the relative importance of the various components of the State's case. *See* [*Strickland v. Washington*] ("A fair assessment of attorney performance requires that every effort be made

> to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). At the time Morrison's lawyer decided not to request any discovery, he did not — and, because he did not ask, could not — know what the State's case would be. While the relative importance of witness credibility vis-a-vis the bedsheet and the related expert testimony is pertinent to the determination whether respondent was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery.

Id. at 386-87. Because Morrison had never had an evidentiary hearing at the district court level on his underlying Fourth Amendment claim, this Court affirmed the Third Circuit Court of Appeals' decision to remand to the district court in order for an evidentiary hearing to be held. *Id.* at 373, 391.

In his concurring opinion, which was joined by Chief Justice Burger and then Associate Justice Rehnquist, Justice Powell addressed an issue that had not been raised by the parties nor discussed by the lower courts. In essence, in this concurring opinion Justice Powell stated that a defendant can never meet the prejudice standard of *Strickland v. Washington* if the defendant's counsel's deficient performance consisted of failing to move to suppress evidence that was allegedly illegally seized but was reliable. In making this argument Justice Powell placed great emphasis on this Court's holding in *Strickland v. Washington* to the effect that the ultimate purpose of counsel's assistance to a defendant in a criminal case was to insure that the verdict in the case was reliable. *Kimmelman v. Morrison*, 477 U.S. at 395 (quoting *Strickland v. Washington*, 466 U.S. at 696). Justice Powell

cited several of this Court's precedents for the proposition that, ". . . the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict." *Id.* at 396. Justice Powell stated further that the ". . . exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it 'deflects the truthfinding process and often frees the guilty'." *Id.* at 396. Justice Powell stated further (internal quotations and footnotes omitted):

> Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment.
>
> Common sense reinforces this conclusion. As we emphasized only last Term, and, as the Court recognizes again today, " '[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free*.' " The right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. In this case, for example, the bedsheet may have provided critical evidence of respondent's guilt, evidence whose relevance and reliability cannot seriously be questioned. The admission of the bedsheet thus harmed respondent only in the sense that it helped the factfinder to make

a well-informed determination of respondent's guilt or innocence.

Id. at 396-97. In concluding, Justice Powell noted that he did not vote to reverse the decision of the Third Circuit Court of Appeals because neither the parties below nor the lower courts had raised or discussed the *Strickland v. Washington* prejudice issue that he believed would otherwise be dispositive.

C. *The Collins v. Lockhart decision and its subsequent overruling.*

At its simplest level, the instant case presents a routine application of the principles of law governing claims of ineffective assistance of counsel noted above that were set forth by this Court in *Strickland, supra.* This routine issue of ineffective assistance of counsel is as follows: Was Fretwell's trial counsel ineffective because he failed to make a particular objection at the sentencing phase of Fretwell's capital felony murder trial. The Eighth Circuit Court of Appeals concluded that Fretwell's trial counsel was ineffective because he had failed to make a particular objection at the penalty phase of Fretwell's trial. Specifically, the Eighth Circuit concluded that Fretwell's trial counsel was ineffective, as measured by the standard set forth by this Court in *Strickland v. Washington,* when trial counsel failed to object to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain" in the penalty phase of Fretwell's capital robbery-murder trial. According to the Court of Appeals, Fretwell's trial counsel should have objected to the submission of pecuniary gain as an aggravating circumstance on the basis of the Court of Appeals' holding in the case of *Collins v. Lockhart,* 754 F.2d 258 (8th Cir.), *cert.* 474 U.S. 1013 (1985). According to the Court of Appeals, Fretwell suffered prejudice — the jury's sentencing him to death — when his trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

In *Collins v. Lockhart,* the Eighth Circuit Court of Appeals held that the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments prohibits the submission to the jury of the aggravating circumstance of

pecuniary gain in death penalty cases where robbery-murder is the capital murder charge at issue. The Court of Appeals reached this conclusion by postulating the universal truth that every robber-murderer kills in order to realize a pecuniary gain. *Id.* at 264. From this first principle the Court of Appeals concluded that a jury would automatically find pecuniary gain as an aggravating circumstance in every robbery-murder case and that, therefore, pecuniary gain ". . . cannot be a factor that distinguishes some robber-murderers from others." *Id.* at 264. According to the Court of Appeals, such a state of affairs violates the Eighth Amendment's prohibition against cruel and unusual punishment because:

> [a]n aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime.

Id. at 264. In essence, in *Collins* the Court of Appeals held that the pecuniary gain aggravating circumstance must further narrow a subclass of capital murderers, robber-murderers, that had already been winnowed out of the class of all murderers by Arkansas' designation of robbery-murder as capital murder. To put the matter another way, in *Collins* the Eighth Circuit Court of Appeals held that in capital murder cases, a state cannot "double-count" an attendant circumstance such as the commission of murder in order to realize a pecuniary gain as an element of capital murder and also as an aggravating circumstance that would justify the imposition of the death penalty.

The Eighth Circuit Court of Appeals handed down its decision in *Collins v. Lockhart* on January 31, 1985. Approximately six months later, in the first week of August,

1985, Fretwell stood trial for the robbery-murder of Sherman Sullins.

In 1988 *Collins v. Lockhart* was effectively overruled. It was effectively overruled by the decision that this Court handed down in the case of *Lowenfield v. Phelps*, 484 U.S. 231 (1988). In *Lowenfield* this Court held that the Eighth Amendment's prohibition against cruel and unusual punishment does not prohibit in death penalty cases the "double-counting" of an attendant circumstance of capital murder so that it serves as both an element of the offense and also as an aggravating circumstance that justifies the imposition of a sentence of death. In reaching this conclusion in *Lowenfield*, this Court did nothing more than apply the joint opinion that this Court had rendered twelve years earlier, in 1976, in the case of *Jurek v. Texas*, 428 U.S. 262. In *Lowenfield* this Court held (internal citations omitted):

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, 428 U.S. 262 (1976), establishes this point. The *Jurek* Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the

evidence, the defendant's acts were an unreasonable response to the victim's provocation. *Id.*, at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. *Id.*, at 271-274. But the opinion announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg*, *supra*, and *Proffitt*, *supra*:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option — even potentially — for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways:

> The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *See also Zant*, *supra*, at 876, n.13, discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Lowenfield, at 244-46. Indeed, the Eighth Circuit Court of Appeals itself reached the conclusion that this Court's decision in *Lowenfield* overruled its "double-counting" holding in *Collins v. Lockhart*. The Eighth Circuit acknowledged that *Collins* was no longer a valid Eighth Amendment precedent in *Perry v. Lockhart*, 871 F.2d 1384

(8th Cir.), *cert. denied*, 493 U.S. 959 (1989). Like *Collins*, *Perry* was a habeas corpus case in which a robber-murderer attacked the validity of his death sentence because the aggravating circumstance of pecuniary gain had been "double-counted." In *Perry* the Eighth Circuit applied *Lowenfield* retroactively and held, "[w]e conclude, therefore, that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*." *Id.* at 1393. Furthermore, in *Perry*, the Court of Appeals noted that in *Lowenfield* this Court ". . . did not announce a new rule. It merely applied a rule that had been announced in *Jurek* [*v. Texas*, 428 U.S. 262 (1976)]." *Id.* at 1394. In *Collins* the Court of Appeals had failed to cite this Court's joint opinion in *Jurek v. Texas*; therefore, *Collins v. Lockhart's* "double-counting" holding was never correct.[3]

[3]Notwithstanding the Eighth Circuit's statement in *Collins* that the Arkansas Supreme Court had rejected the *Collins* "double-counting" issue on its merits when it affirmed Collins' capital felony murder conviction and death sentence on direct appeal (*Collins*, 754 F.2d at 262) the Arkansas Supreme Court never addressed the *Collins* "double-counting" issue on its merits until after this Court had handed down its opinion in *Lowenfield*. In Fretwell's direct appeal the Arkansas Supreme Court did not reach the *Collins* "double-counting" issue because Fretwell's counsel failed to raise the issue at the trial court level. *Fretwell v. State*, 289 Ark. 91, 98-9, 708 S.W.2d 630, 634 (1986). The Arkansas Supreme Court addressed the *Collins* double-counting" issue for the first time only after this Court decided *Lowenfield*. That court did so in the case of *O'Rourke v. State*, 295 Ark. 57, 746 S.W.2d 52 (1988). In *O'Rourke* the court disposed of the *Collins* "double-counting" issue merely by citing and applying *Lowenfield*. *O'Rourke* at 63-4, 746 S.W.2d at 55-6.

D. *Respondent Fretwell suffered no prejudice when his trial counsel failed to make a Collins v. Lockhart-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.*

1. *Application of the standard of prejudice set forth by Justice Powell in his concurring opinion in Kimmelman v. Morrison shows that Fretwell did not suffer any prejudice from his counsel's deficient performance.*

Petitioner Lockhart urges this Court to adopt the position set forth by Judge Loken when he concluded, in dissent, that Fretwell suffered no prejudice from his trial counsel's deficient performance in failing to object to the submission to the jury of the aggravating circumstance of pecuniary gain. In essence, Judge Loken followed the reasoning of Justice Powell's concurring opinion in *Kimmelman v. Morrison, supra*. This Court need not adopt Justice Powell's prejudice analysis for purposes of application of the *Strickland* standard to all claims of ineffective assistance of counsel — this Court need only apply Justice Powell's *Kimmelman* analysis to claims of ineffective assistance of counsel that resemble the instant case procedurally. For these kinds of claims of ineffective assistance of counsel — claims based on trial counsel's failure to raise an objection based on a case law holding that was overruled after the defendant's trial — this Court should conclude that Justice Powell's *Kimmelman* analysis of prejudice is the proper standard. This Court should do so in order to prevent the defendant from receiving what Justice Powell described as "a windfall." *Kimmelman*, 477 U.S. 393, 396. The nature of the windfall that Fretwell received from the Court of Appeals is apparent in light of the fact that *Collins v. Lockhart* was incorrectly decided in the first place and was, even by the Court of Appeals' acknowledgment, no longer good law by the time it reviewed Fret-

well's case. As petitioner Lockhart has shown in section C, *supra*, the Court of Appeals erred in deciding *Collins v. Lockhart* in the first place because it was contrary to this Court's joint opinion in *Jurek v. Texas*, 428 U.S. 262 (1976). Indeed, in the *Collins* opinion itself the Court of Appeals nowhere mentions, much less discusses, *Jurek*.

Petitioner Lockhart argued to the Eighth Circuit Court of Appeals that it had incorrectly decided the *Collins v. Lockhart* "double-counting" issue in the first instance and that had Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, the Searcy County Circuit Court would have rejected such an objection on the basis of this Court's joint opinion in *Jurek* and on the basis of this Court's subsequent affirmation of *Jurek* as good law in this Court's opinion in *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983). Both *Jurek v. Texas* and *Zant v. Stephens* had been handed down by this Court well before August, 1985, when Fretwell stood trial in Searcy County Circuit Court for the robbery-murder of Sherman Sullins.

Lockhart buttressed his argument in this regard to the Court of Appeals by pointing out that this Court's opinion in *Lowenfield v. Phelps* had effectively overruled *Collins v. Lockhart* and that in *Lowenfield* this Court had done nothing more than routinely apply *Jurek v. Texas*. The Court of Appeals rejected Lockhart's contention that the Searcy County Circuit Court would have followed *Jurek v. Texas* had Fretwell's counsel made a "double-counting" objection based on *Collins v. Lockhart*. The Eighth Circuit did so by noting that the death penalty sentencing procedure at issue in *Jurek v. Texas* did not require the jury to balance aggravating circumstances against mitigating circumstances while

Arkansas' death penalty sentencing procedure did require such balancing and by noting that the Searcy County Circuit Court was bound as a matter of the Supremacy Clause to treat *Collins v. Lockhart* as binding precedent with regard to the "double-counting" issue. The Court of Appeals' reasoning on both these points is wrong. The Court of Appeals' errors have bestowed on Fretwell the sort of "windfall" that Justice Powell's analysis of prejudice in his concurring opinion in *Kimmelman v. Morrison* would deny to defendants who cannot show that their counsel's deficient performance led to an unreliable guilty verdict. *Kimmelman*, 477 U.S. at 396-97.

Jurek v. Texas plainly establishes the point that states may perform the required narrowing of the class of all murderers into a subclass of death-eligible murderers at the definitional stage of capital murder. The state trial court, the Searcy County Circuit Court, would have followed *Jurek v. Texas* — as it would have been required to do — and held that Arkansas' death penalty sentencing procedure genuinely narrowed the class of all murderers into a death-eligible subgroup by defining robbery-murder as capital murder. The Eighth Circuit Court of Appeals' opinion in the instant case never explains how the additional step in Arkansas' death penalty procedure of balancing aggravating circumstances with mitigating circumstances would have kept the Searcy County Circuit Court from relying on *Jurek v. Texas* and *Zant v. Stephens*, 462 U.S. 862, 875 n.13 (1983) to conclude that the required genuine narrowing occurred when robbery-murder was defined as capital felony murder. If Fretwell's trial counsel had raised the *Collins v. Lockhart* "double-counting" issue before the Searcy County Circuit Court, that court would have relied on this Court's joint opinion in *Jurek v. Texas* and would have concluded that even if pecuniary gain was an element of robbery-murder, pecuniary gain, as an aggravating

circumstance, could still be balanced in the penalty phase of Fretwell's trial against any mitigating evidence that he might introduce. Lockhart's argument in this regard turns on this Court's holding in *Strickland v. Washington* and *Nix v. Whiteside* that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland*, 466 U.S. at 695 and *Nix*, 475 U.S. at 175. *Collins v. Lockhart* was itself a "lawless" decision to the extent that it was contrary to this Court's joint opinion in *Jurek v. Texas*. The Court of Appeals' assumption in the instant case that the Searcy County Circuit Court would have followed *Collins v. Lockhart* and would not have followed *Jurek v. Texas* sets up Fretwell's "windfall" by bestowing on him a "lawless decisionmaker," the Searcy County Circuit Court, whose "lawless decision" would have been to sustain a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

The Court of Appeals avoids confronting the "lawless" nature of *Collins v. Lockhart* when viewed by the Searcy County Circuit Court at the time of Fretwell's trial by asserting that if Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, the Searcy County Circuit Court would have been ***required***, by the Supremacy Clause, to accept and apply the "double-counting" rationale of that decision. *Fretwell v. Lockhart*, 946 F.2d at 577. To say the least, the Court of Appeals' reference to the Supremacy Clause, in the context of the instant case, does not make any sense. It would, if, for example, the issue were whether Carl Albert Collins could go to federal district court and, on the strength of his victory in *Collins v. Lockhart*, bar any effort by Arkansas prison officials to put him to death. Of course, there is no such issue in the instant case. The

Supremacy Clause has nothing to do with the doctrine of *stare decisis*.[6] Lower federal courts and legal scholars have repeatedly concluded that state courts are ***not*** bound to follow the decisions of lower federal courts. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965); 1B J. Moore, J. Lucas and T. Currier, *Moore's Federal Practice* Par. 0.402[1] at 23 (1992); 1 R. Rotunda, J. Nowak and J. Young, *supra*, at §1.6(c); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1053 (1979); and Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 Colum. L. Rev. 943, 945-47 (1948); *see also Sawyer v. Smith*, 497 U.S. ___, 110 S. Ct. 2822, 2831, 111 L.Ed.2d 193, 210 (1990) ("[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). In its opinion in the instant case the Eighth Circuit Court of Appeals cites no authority whatsoever, other than the Supremacy Clause itself, in support of its assertion that the Searcy County Circuit Court was bound to follow its decision in *Collins v. Lockhart*.[7]

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[6]The Supremacy Clause is found in Article VI, clause 2 of the United States Constitution. Generally speaking, the Supremacy Clause has been interpreted by this Court to make state law subordinate to the United States Constitution and other federal law and to require state officials to carry out orders issued by federal courts. *See Cooper v. Aaron*, 358 U.S. 1 (1958) and 1 R. Rotunda, J. Nowak and J. Young, *Constitutional Law* §1.6 (1986).

[7]State courts are divided on this issue and there is some state court authority in support of the Court of Appeals' assertion that state courts are bound, as a matter of *stare decisis*, to follow decisions rendered by lower federal courts. *See* 20 Am. Jur. 2d *Courts* §230 (1965) and 21 C.J.S. *Courts* §159 (1990). The Arkansas Supreme Court does not consider itself bound, as a matter of precedent, by the decisions of lower federal courts. *See, e.g., Hendrickson v. State*, 285 Ark. 462, 466, 688 S.W.2d 295, 297 (1985) (rejecting the Eighth Circuit Court of Appeals' death-qualified jury

2. *Fretwell suffered no prejudice when his trial counsel failed to make a Collins v. Lockhart "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain as the term of art "prejudice" was explained by this Court in Strickland v. Washington.*

It is not necessary for this Court to adopt Justice Powell's analysis of *Strickland v. Washington*-type prejudice that he set forth in his concurring opinion in *Kimmelman v. Morrison* in order to reverse the decision of the Court of Appeals in the instant case. This Court may do so simply by relying on the concept of "prejudice" as this Court explained it in *Strickland v. Washington.*

As noted above in section B(1), this Court stated in *Strickland* that a defendant shows that he suffered prejudice as a result of his counsel's deficient performance when the defendant shows ". . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Moreover, this Court implied in *Strickland v. Washington*, and made explicit in *Kimmelman v. Morrison*, that *Strickland v. Washington*-type prejudice analysis can rest on a hindsight view of the facts of the case. *Kimmelman*, 477 U.S. at 386-87. This Court implied in *Strickland v. Washington* that hindsight evaluations of prejudice were permissible when this Court stated that, ". . . a verdict or conclusion only weakly supported by the

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[7] *Continued*
decision that was eventually reversed by this Court in *Lockhart v. McCree*, 476 U.S. 162 (1986)) and *Ruiz v. State*, 275 Ark. 410, 415, 630 S.W.2d 44, 47-8 (1982) (pre-*Strickland v. Washington* standard for analyzing claims of ineffective assistance of counsel).

record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. *See* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 Colum. L. Rev. 9, 93 (1986).

Using a hindsight analysis of the situation that Fretwell would have faced on direct appeal before the Arkansas Supreme Court — assuming that his trial counsel had fulfilled his Sixth Amendment duty and had adversarially tested the strength of the State's proof that Fretwell deserved the death penalty by raising a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain and, assuming further, that the Arkansas Supreme Court itself had rendered the *Collins v. Lockhart* decision but that this hypothetical *Collins v. Lockhart* decision had been effectively overruled by this Court's decision in *Lowenfield v. Phelps, supra* — it is evident that in three of the four possible hypothetical scenarios that emerge, the pecuniary gain aggravating circumstance was either not considered by the jury and it sentenced Fretwell to death anyway or Fretwell would have lost on direct appeal on the merits of the *Collins v. Lockhart* issue and in one of the hypothetical situations would still receive the death penalty.

In the first of these hypothetical situations, assuming that Fretwell's counsel had taken the necessary steps to render Fretwell's trial reliable by testing the proof of the State's case for putting Fretwell to death by raising the *Collins v. Lockhart* "double-counting" issue, assuming further that, the trial court sustained counsel's argument based on the Arkansas Supreme Court's hypothetical *Collins v. Lockhart* decision and assuming further that the jury voted to sentence Fretwell to

death anyway, it is clear that Fretwell would have suffered no prejudice because the jury's sentencing Fretwell to death could not have been influenced by the aggravating circumstance of pecuniary gain.

In two of the other possible hypothetical scenarios, Fretwell would lose on the *Collins v. Lockhart* issue on the merits before the Arkansas Supreme Court, assuming that by the time that court considered the issue, its own hypothetical *Collins v. Lockhart* decision had been overruled by this Court's decision in *Lowenfield v. Phelps*. One of these hypothetical situations occurs if Fretwell's counsel raises the *Collins v. Lockhart* "double-counting" issue on its merits, the trial court denies the objection and the jury sentences Fretwell to death. In this hypothetical situation, Fretwell would appeal this issue on its merits and he would lose before the Arkansas Supreme Court.[8] The third hypothetical situation where Fretwell loses on the merits before the Arkansas Supreme Court is very much like the hypothetical situation just described. In this third hypothetical situation, Fretwell's counsel raises the *Collins v. Lockhart* "double-counting" issue on its merits, the trial court denies counsel's argument, but the jury does not sentence Fretwell to death. In this hypothetical situation Fretwell could raise the *Collins v. Lockhart* issue on direct

[8]The Arkansas Supreme Court applies *Lowenfield v. Phelps* retroactively to cases pending on direct appeal. *See, e.g., Ruiz v. State*, 299 Ark. 144, 154-55, 772 S.W.2d 297, 302 (1989). In this regard, the Arkansas Supreme Court follows the same practice as this Court. This Court will overrule its precedents and apply the overruling decision retroactively to cases on direct review and reject procedural and evidentiary claims in criminal cases. *See, e.g., Payne v. Tennessee*, 501 U.S. ___, 111 S. Ct. 2597, 115 S. Ct. 720 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989) and *Booth v. Maryland*, 482 U.S. 496 (1987); *see also Stringer v. Black*, 503 U.S. ___, 112 S. Ct. 1130, 1139, 117 L.Ed.2d 367, 382 (1992) and Fallon and Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1745 (1991).

appeal to the Arkansas Supreme Court (assuming that he had standing to do so) and would lose on the merits, however the State could not retry the penalty phase of Fretwell's trial. *See* footnote 9, *infra*. In this hypothetical situation Fretwell suffered no prejudice from the jury's consideration of the pecuniary gain aggravating circumstance because the jury considered it and chose not to sentence Fretwell to death.

The circumstances of three hypothetical scenarios noted above are very important with regard to this Court's resolution of the instant case. In each of these three hypothetical situations, Fretwell's trial counsel fulfilled his Sixth Amendment duty by raising the *Collilns v. Lockhart* "double-counting" issue. In each of these three hypothetical situations, because counsel did adversarially test the strength of the State's proof that Fretwell should die, according to this Court's holdings in *Strickland v. Washington*, *Nix v. Whiteside*, and *Kimmelman v. Morrison*, Fretwell's trial was fair and produced a reliable result where " '. . . the guilty [were] convicted and the innocent [went] free.' " *Kimmelman v. Morrison*, 477 U.S. at 379-80. Fretwell, whose counsel was ineffective, should be no better off for his counsel's ineffectiveness than these three hypothetical Fretwells whose hypothetical counsel were effective in that they raised the *Collins v. Lockhart* "double-counting" issue and thereby adversarially tested the strength of the State's proof that Fretwell should be put to death. Two of these three hypothetical Fretwells would be put to death and one would live even though the jury considered pecuniary gain as an aggravating circumstance. To say the least, it would stand the notion of effective assistance of counsel on its head for Fretwell to be in a more advantageous position because his counsel failed to adversarially challenge the strength of the State's proof that he should be put to death than hypothetical

defendants who lose the *Collins v. Lockhart* issue on its merits on direct appeal and are put to death.

The fourth possible hypothetical scenario is identical to the Court of Appeals' disposition of the instant case. Given that this hypothetical situation, like the other three noted above, assumes that the trial court was bound to follow the Arkansas Supreme Court's hypothetical *Collins v. Lockhart* decision, this fourth hypothetical situation presents the core of the argument accepted by the Eighth Circuit Court of Appeals and the argument that Fretwell will doubtlessly advance to this Court. In this fourth hypothetical situation Fretwell's trial counsel raises the *Collins v. Lockhart* "double-counting" objection to the submission to the jury of the aggravating circumstance of pecuniary gain, the trial court sustains the objection and does not instruct the jury on the aggravating circumstance of pecuniary gain and the jury votes not to sentence Fretwell to death. The State would win the *Collins v. Lockhart* argument on its merits on cross-appeal to the Arkansas Supreme Court, however, any retrial of the penalty phase of Fretwell's trial would be barred by former jeopardy principles, given that Arkansas' capital sentencing procedure is trial-like.[9] In essence, the Court of Appeals

[9]In *Bullington v. Missouri*, 451 U.S. 430 (1981) this Court held that a state cannot retry the penalty phase of a bifurcated capital murder trial if the jury votes not to sentence the defendant to death if the penalty phase of the trial is sufficiently trial-like. Arkansas' death penalty sentencing procedure was, in August, 1985 when Fretwell stood trial (and still is today) sufficiently trial-like for purposes of application of *Bullington v. Missouri, supra*, especially given the requirement that the State must prove its aggravating circumstances beyond a reasonable doubt. Ark. Stat. Ann. §41-1302(1)(a) (1977) (presently codified as Ark. Code Ann. §5-4-603(a)(1) (Supp. 1991)). In any event, as a matter of Arkansas Supreme Court case law, the State is forbidden from seeking the death penalty a second time for the same offense after a jury has voted not to sentence the defendant in a capital murder trial to death. *Fuller v. State*, 246 ARk. 704, 709-10, 439 S.W.2d 801, 804, *cert. denied*, 396 U.S. 930 (1969).

rendered its decision in the instant case on the basis of this hypothetical situation. The crux of the Eighth Circuit's analysis is not explicitly stated by the majority opinion, however, Judge Loken, in dissent, identified the key point of the Court of Appeals' majority decision when he stated, "Presumably the majority limits the state's resentencing options to life imprisonment on the assumption that Fretwell's sentencing jury would have sentenced him to life if not instructed that pecuniary gain could be an aggravating circumstance. Of course, this assumption is highly speculative." *Fretwell*, 946 F.2d at 579-80. Lockhart submits that Judge Loken's observation is entirely correct — the majority opinion's assumption that the jury would not have sentenced Fretwell to death had Fretwell's counsel made a *Collins v. Lockhart* "double-counting" objection that the state trial court would have sustained is entirely speculative. Apparently, the Eighth Circuit's guesswork in this regard is based on the jury's not finding the other aggravating circumstance that was submitted for its consideration — murder committed for the purpose of avoiding or preventing an arrest. (J.A. 7) Lockhart submits that in making this assumption the majority opinion for the Court of Appeals violated one of this Court's holdings in *Strickland v. Washington* having to do with the way in which prejudice is to be analyzed. In *Strickland v. Washington* this Court stated, "Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review . . . should not be considered in the prejudice determination." *Strickland*, 466 U.S. at 695. The Court of Appeals' majority opinion rests on unstated assumptions about what would have been the hypothetical "process of decision" if the jury had before it only the aggravating circumstance of murder committed for the purpose of avoiding or preventing an arrest. Although the *results* of the "process of decision" that the jurors actually went through are part of the record in the instant case, their "process of decision" itself is not part of

the record — the jury's actual deliberations are never part of the record on appeal in a criminal case, much less hypothetical deliberations.

The majority opinion errs not only in making unstated assumptions about the "process of decision" that the jury would have gone through if it had considered only the aggravating circumstance of murder committed to avoid or prevent an arrest, but the Eighth Circuit's unstated assumptions about how the jury would have deliberated are also inconsistent with this Court's approach to the problem of inconsistent verdicts in criminal cases. In *United States v. Powell*, 469 U.S. 57 (1984) this Court held that verdicts of guilty with respect to specific charges that are inconsistent with verdicts of not guilty with regard to related charges in the same trial are not subject to reversal and dismissal. This Court so held because such inconsistencies are not necessarily proof that the jury erred in evaluating the sufficiency of the government's case so much as they are indications of lenity by the jury or nullification by the jury of an arbitrary or oppressive prosecution. In the course of discussing the implications of inconsistent verdicts this Court stated:

> We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake.

Id. at 66. Lockhart submits that the majority opinion of the Court of Appeals below necessarily involves this sort of

speculation or the sort of inquiry into the jury's deliberations that this Court refuses to make for claims of error resulting from inconsistent jury verdicts. Lockhart submits that just as this Court will not permit a defendant to attack an inconsistent verdict by means of speculation, this Court should also not permit a defendant to attack a verdict by asking a reviewing court to speculate what would have happened if his trial counsel had made an objection that counsel, in fact, did not make.

E. *The remedy for deprivation of the Sixth Amendment's right to the effective assistance of counsel is a new trial.*

If this Court should conclude that the Eighth Circuit Court of Appeals did not err in concluding that Fretwell suffered prejudice in the penalty phase of his capital felony murder trial when his trial counsel failed to object to the submission to the jury of the aggravating circumstance of pecuniary gain (a position that petitioner Lockhart certainly does not concede), Lockhart submits that the Eighth Circuit Court of Appeals erred in ordering that the proper habeas corpus remedy was prohibition of retrial of the penalty phase of Fretwell's capital murder trial and reduction of his death sentence to a sentence of life imprisonment without possibility of parole. Federal courts conducting habeas corpus review pursuant to 28 U.S.C. §2254(d) are, when the issuance of the writ is warranted, to ". . . dispose of the matter as law and justice require." 28 U.S.C. §2243. However, when federal courts issue the writ of habeas corpus they limit the remedy of prohibition of retrial only to those situations where the defendant should never have been brought to trial in the first place, such as when the defendant had a former jeopardy-based right or a speedy trial-based right or an *ex post facto*-based right not to be brought to trial at all or where the state had initially prosecuted the defendant on the basis of

a criminal statute that was unconstitutional in some respect. L. Yackle, *Postconviction Remedies* §143 (1981).

In evaluating claims of ineffective assistance of counsel this Court carefully separates the legal issue that underlies the claim of ineffective assistance from the ineffective assistance of counsel claim itself and analyzes it separately in order to determine the proper disposition of the case. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986). Deprivation of the Sixth Amendment right to the effective assistance of counsel does not call into question the ability of the state to bring the defendant to trial in the first place nor does it involve prosecution of the defendant pursuant to an unconstitutional statute. Therefore, the Eighth Circuit Court of Appeals erred in holding that Arkansas is barred from retrying the penalty phase of Fretwell's capital felony murder case. *See Duhamel v. Collins*, 955 F.2d 962, 968 (5th Cir. 1992) (federal court conducting review pursuant to 28 U.S.C. §2254(d) has no authority to reduce a sentence of death to a sentence of life imprisonment on the basis that defendant had been deprived of his right to the effective assistance of counsel).

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Fretwell suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court is based on an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court reverse the holding of the Eighth Circuit Court of Appeals in the instant case and, in so doing, hold that respondent Fretwell was not deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court. Petitioner Lockhart respectfully requests further that this Court deny respondent Fretwell any relief whatsoever.

Respectfully submitted,

WINSTON BRYANT, ESQ.
ARKANSAS ATTORNEY GENERAL

BY: CLINT MILLER, ESQ.
SENIOR ASSISTANT ATTY. GENERAL
J. BRENT STANDRIDGE, ESQ.
ASSISTANT ATTY. GENERAL
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657
Counsel for Petitioner
A. L. Lockhart, Director
Ark. Department of Correction

No. 91-1393

In The

Supreme Court of the United States

October Term, 1992

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Petitioner,

vs.

BOBBY RAY FRETWELL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE RESPONDENT

RICKY R. MEDLOCK
(Appointed by this Court)
421 Main Street
P.O. Drawer 475
Arkadelphia, Arkansas 71923
(501) 246-0303

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT FRETWELL WAS DENIED HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL FELONY MURDER TRIAL IN THAT HE SUFFERED PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE A "DOUBLE-COUNTING" OBJECTION, BASED ON THE EIGHTH CIRCUIT'S HOLDING IN *COLLINS V. LOCKHART*, 754 F.2d 258 (8TH CIR.), *CERT. DENIED*, 474 U.S. 1013 (1985), TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN.

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SUMMARY OF ARGUMENT

The decision of the United States Eighth Circuit Court of Appeals in the instant case unconditionally vacating respondent's death sentence should be affirmed. Respondent was deprived of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments, when counsel at the sentencing phase of his trial for robbery-murder failed to raise an objection to the submission to the jury of the aggravating circumstance that the murder was committed for "pecuniary gain". Under the rule of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U. S. 1013 (1985), valid law at the time of the trial, use of an aggravating circumstance which duplicated an element of the offense charged violated the Eighth Amendment. *Collins* held that such duplicative circumstances failed to narrow the class of death eligible offenders, providing no meaningful distinction between all convicted offenders and those deserving the death penalty. Had the appropriate *Collins*-based objection been raised, the jury would not have considered the "pecuniary gain" circumstance. Since no other aggravating circumstances were found by the jury, the respondent would have received a sentence of life without parole.

Collins was the law at the time of respondent's trial, and application of its rule would have prevented the jury from considering the aggravating circumstance of pecuniary gain. Apparently, however, respondent's trial counsel was unaware of the *Collins* decision and made no objection when the prosecution offered the jury instruction regarding the aggravating circumstance. His failure to so

object constituted deficient performance and resulted in prejudice to the respondent.

Respondent's claim of deprivation of his right to the effective assistance of counsel is governed by standards established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail he must demonstrate that his claim satisfies both prongs of the *Strickland* test, i.e. (1) that counsel's performance was deficient, and (2) that the defendant performance resulted in prejudice to the defense. As the United States District Court noted in its opinion in *Fretwell v. Lockhart*, 739 F.Supp. 1334 (E.D. Ark. 1990), counsel had a duty to be aware of all law relevant to death penalty cases, and should have made a *Collins*-based objection. His failure to do so satisfies the first prong of the *Strickland* test. As noted above, in the absence of the "pecuniary gain" circumstance, the jury would have had no basis upon which to impose the death sentence. The reliability of the death sentence is therefore called into question, and the prejudice to respondent is obvious. He would have received a sentence of life without parole absent counsel's unprofessional error.

Some three years after the respondent's trial this Court decided the case of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), which held that the "narrowing function" required for a regime of capital punishment may be provided in either of two ways: (1) The legislature may itself narrow the definition of the offense so that narrowing is performed by the jury at the guilt phase of the trial, or, (2) the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. Subsequently, in reliance on *Lowenfield*, the United States Eighth Circuit

Court of Appeals held in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U. S. 959 (1989), that *Lowenfield* overruled *Collins*. The petitioner argues that this subsequent change in the law should operate to eliminate the prejudice suffered by respondent. It is suggested that through the use of hindsight, this Court should view *Collins* as a "lawless decision", rule that it was never good law and that respondent should never have been entitled to its benefits. Once again, *Strickland* provides guidance. It states that in analyzing ineffective assistance claims, the reviewing court must "judge the reasonableness of counsel's challenged conduct as of the time of counsel's conduct." *Id.* at 690. Respondent urges the Court to follow *Strickland* and recognize that counsel's conduct was unreasonably deficient, and that there exists a reasonable probability that the outcome of the proceeding would have been different but for counsel's deficient performance.

While respondent's argument rests on the strength of *Strickland*, and its proscription against the use of hindsight, respondent also contends that the *Collins* decision has continued validity. The argument on this issue posits that application of *Lowenfield* to the Arkansas capital punishment scheme represents an overexpansion of its rule. In other words, "double-counting" of an aggravating circumstance which duplicates an element of the capital offense remains, under a statute such as Arkansas', an impermissible Eighth Amendment violation. Since the Arkansas statute does not narrow the class of death eligible offenders by definition of the offense, narrowing must occur through findings of aggravating circumstances at the penalty phase of the trial, and mere duplication of an

element of the offense provides no meaningful distinction between the class of all capital offenders, and those deserving the death penalty. *Lowenfield*, respondent contends, was not intended to address statutory schemes sueh as Arkansas' where no narrowing occurs within the definition of the offense.

As stated above, respondent's argument for affirmance is not dependent on the continuing validity of *Collins*. Nevertheless, this case presents the issue of *Lowenfield's* applicability to a statutory scheme such as Arkansas', and, should the Court reach the issue, its resolution will provide much needed guidance on this point.

Finally, respondent argues that the only remedy which will remove the taint of prejudice he has sustained is to affirm the decision of the Eighth Circuit to unconditionally reduce his sentence to life without parole. To resentence him under the law as it now exists virtually assures that he will receive the death penalty, and ignores the fact that he was deprived of his Sixth Amendment right to the effective assistance of counsel.

ARGUMENT

THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY FOUND THAT RESPONDENT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN AT THE PENALTY PHASE OF HIS CAPITAL FELONY MURDER TRIAL.

A. Introduction

As the United States Eighth Circuit Court of Appeals found in *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), respondent Fretwell was deprived of his Sixth Amendment right to the effective assistance of counsel at his state court capital felony murder trial. When counsel failed to object, pursuant to *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), to the submission of the aggravating circumstance of pecuniary gain at the penalty phase of respondent's trial for robbery-murder, his performance was deficient and respondent was prejudiced. See *Strickland v. Washington*, 466 U.S. 668 (1984), establishing the two-prong test of deficient performance and resulting prejudice for ineffective assistance claims. The petitioner argues, however, that because *Collins* was ultimately overruled by the United States Eighth Circuit Court of Appeals (some three years after respondent's trial), in reliance upon *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), it was a "lawless decision" at the time of respondent's trial. Petitioner's Brief, p. 48. As such, according to petitioner, the trial court would not have heeded its directive and

would have denied counsel's *Collins*-based motion had one been made. Thus, according to *Perry*, the outcome of the proceeding would have been the same, i.e. Fretwell would have received the death penalty, and could not claim that he suffered prejudice. Respondent submits, however, that at the time of his trial there was no other law on point, besides *Collins*, construing the Arkansas capital punishment scheme, and that there is no logical reason to assume that the trial court would have ignored the controlling law had counsel made the appropriate objection. Thus there is a "reasonable probability" that the outcome would have been different if the motion had been made, i.e. Fretwell would not have received the death sentence. The prejudice to Fretwell is obvious and the *Strickland* test is met.

Although *Strickland* is clear that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Id.* at 690, petitioner employs the benefit of hindsight to suggest that Fretwell never had a right to the benefit of *Collins*. In support of this argument petitioner points out that analysis of ineffective assistance claims should not be limited to mechanical application of the "outcome determinative" approach, but should address the larger question of whether the respondent was deprived of a fundamentally fair trial, or was denied a right guaranteed by the Constitution. Petitioner argues that because *Collins* was overruled, Fretwell's claim is based on a perceived right not granted by the Constitution, such as that discussed in *Nix v. Whiteside*, 475 U.S. 157 (1986), and that to grant him relief would confer upon

him a "constitutional windfall" as discussed by Justice Powell in his concurring opinion in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Fretwell submits that both *Nix* and *Whiteside* are distinguishable from his case. He seeks redress for the deprivation of a fundamental right, the right to the effective assistance of counsel, based on a claim of the deprivation of another fundamental right, the right to be free from the arbitrary imposition of the death penalty conferred by the Eighth Amendment. These rights are both fundamental and personal, unlike the nonexistent right to commit perjury claimed in *Nix*, or the windfall conferred by the exclusionary rule discussed in *Kimmelman*.

Strickland makes clear that "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Such an assessment can lead to but one conclusion, that Fretwell was deprived of the benefit of valid law existing at the time of his trial. That *Collins* was ultimately overruled, long after respondent's trial, should not and cannot under *Strickland*, be held to relate back to remove the taint of prejudice suffered by respondent due to counsel's deficient performance.

Respondent's argument for affirmance rests on the strength of *Strickland*, and this Court should recognize his claim of ineffective assistance on that basis, viewing the claim in light of the facts and law which existed at the time of his trial. Petitioner's argument, on the other hand, reaches beyond *Strickland*, as it must, and relies on the use of hindsight to support the premise that *Collins* was

never good law, and that Fretwell was therefore never entitled to its benefit. As the Eighth Circuit noted in its opinion below, *Collins* was good law at the time of respondent's trial, and, respondent submits, it has continuing validity. While respondent's claim does not depend on *Collins'* resurrection, this case places the issue before the Court and provides an opportunity for clarification of the applicability of *Lowenfield* to the Arkansas capital punishment regime.

B. *Strickland v. Washington*, 466 U.S. 668 (1984).

1. *First Prong – Deficient Performance.*

Petitioner correctly asserts at page 21 of its brief that analysis of this issue must begin with the landmark decision of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* establishes a two-prong test for analysis of ineffective assistance of counsel claims. "First the defendant must show that trial counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. Respondent submits, and petitioner does not suggest otherwise, that the first prong of the test was met when trial counsel failed to move to preclude submission of pecuniary gain to the jury as a possible aggravating circumstance. As stated by the District Court, the rule of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), "was the law of the Eighth Circuit at the time of [Fretwell's] trial . . . ", and "as an attorney representing a defendant in a capital case, trial counsel had a duty to be aware of all law relevant to death penalty cases."

Fretwell v. Lockhart, 739 F.Supp. 1334 (1990). See also *Harrison v. Jones*, 880 F.2d 1279 (11th Cir. 1989), (Counsel's failure to object to the introduction of petitioner's prior conviction based on *nolo contendere* plea, at subsequent criminal trial, clearly outside the range of professionally competent assistance); *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990), (Counsel was ineffective when he failed to raise valid claim of double jeopardy at petitioner's armed robbery trial). Trial counsel should have been aware of the *Collins* decision, and should have at least attempted to use it to benefit his client. His failure to do so was clearly outside the range of professionally competent assistance.

2. *Second Prong – Resulting Prejudice.*

Since counsel's performance was deficient, the only question remaining is whether respondent suffered prejudice because of this deficient performance. *Strickland* indicates that mechanical rules are inappropriate to this type of inquiry, and that the primary issue is whether the result of the proceeding is unreliable. In Fretwell's case, the answer to this question is apparent. If the objection had been granted, and there is no reason to assume that it would not have been, only one possible aggravating circumstance would have remained for the jury's consideration, that the "capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody." Ark. Code Ann. § 5-4-604(5). Since the "avoiding apprehension" aggravating circumstance was not found by the jury, there would have been no basis upon which to return the death sentence. The outcome would have been different in that Fretwell

would have received a sentence of life without parole. The death sentence is therefore an unreliable verdict and the *Strickland* test is met.

That the trial court might have engaged in an alternative analysis and applied the reasoning of *Jurek v. Texas*, 428 U.S. 262 (1976), to arrive at the conclusion that *Collins* was wrong, is, to say the least, unlikely. This argument does nothing more than suggest a possibility for which there is little or no support. *Jurek* construed the Texas capital punishment scheme, which, respondent submits, would have been an initial deterrent, in the face of *Collins*, to the trial judge recognizing it as applicable. Had the judge gone further, he would have recognized that significant differences in the Arkansas and Texas laws render *Jurek* inapplicable. *Lowenfield*, which was grounded in part upon an expansion of the *Jurek* holding, does stand for the proposition that the "narrowing function" required by the Eighth Amendment may be performed in either of two ways – through the finding of guilt based on a narrow legislative definition of the crime, or by consideration of aggravating circumstances at the sentencing phase of the trial. However, it was not until that decision was reached that the continued validity of the *Collins* decision was even considered. The law in the Eighth Circuit at the time of Fretwell's trial was the rule in *Collins*.

Once again, the question under *Strickland* is whether a "reasonable probability" exists that the outcome would have been different, not whether a possibility exists that it might have been the same. *Strickland* also states, that:

> In making a determination whether the specified errors resulted in the required prejudice, a court should presume, absent a challenge to the judgment on the grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification', and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably conscientiously, and impartially applying the standards that govern the decision.

and,

> When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating circumstances did not warrant death.

Id. at 694-95.

Despite petitioner's suggestion to the contrary, Fretwell is not seeking "entitlement to the luck of lawless decisionmaker," but is asking the Court to recognize that he has been the victim of a lawless decisionmaker. The jury was lawless to the extent that it was not properly instructed, an error which prejudiced the outcome of the trial. Had the jurors been instructed according to law, i.e., had the judge withheld the aggravating circumstance of pecuniary gain from their consideration, Fretwell would not have received a death sentence. The record is clear

that although the jury considered an additional aggravating circumstance, they rejected it and found only that the murder was committed for the purpose of pecuniary gain. The prejudice to Fretwell is clear.

Petitioner has posited four hypothetical situations in an attempt to demonstrate that Fretwell did not suffer prejudice. *See* Petitioner's Brief at pp. 51-54. Contrary to the rule of *Strickland*, the petitioner has employed the use of hindsight, assuming facts and law which did not exist at the time of respondent's trial, to create the suggestion of no prejudice. However, when viewed in light of the law and facts in existence at the time, the hypothetical scenarios clearly support the lower courts' findings of prejudice. A discussion of each of the hypotheticals, under appropriate facts and law, follows:

1. Petitioner hypothesizes here that competent counsel made an appropriate objection to the aggravating circumstances of pecuniary gain and that the objection was sustained. Thus pecuniary gain was not submitted to the jury. Inexplicably, petitioner asserts that respondent suffered no prejudice because he still would have received the death penalty. This argument is without merit in that it is based on pure supposition and not on the facts of respondent's case. Respondent would not have been sentenced to death. The only aggravating circumstance found by Fretwell's jury was pecuniary gain. The jury rejected the other aggravating circumstance, "avoiding apprehension", which was submitted. Absent the "pecuniary gain" aggravating circumstance, none existed. Consequently, Fretwell would not and could not have been sentenced to death. Prejudice is evident.

2. In the second hypothetical petitioner posits that effective counsel made the appropriate objection; that the objection was overruled; and that the respondent received a sentence of death, evidently based upon the pecuniary gain aggravating circumstance. Further, petitioner argues a lack of prejudice assuming respondent's appeal on the issue would have been decided adversely to him. This assumption is simply foundationless. At the time of respondent's trial *Collins* was the law of the Eighth Circuit. There is absolutely no basis for an argument that, had the issue been properly preserved, respondent would not have prevailed on appeal. *Lowenfield* and *Perry* were not in existence and were not the law that applied to respondent at the time of his trial and his appeal. *Collins* was the law then, and as is argued elsewhere in this brief, is still viable. To say respondent would have lost this issue on appeal pre-*Lowenfield* is, at best, wishful thinking on the part of petitioner and not based upon the law in effect during the relevant time frame. Respondent was, in fact, prejudiced because, at the time of his conviction and sentence, he would have prevailed on appeal.

3. The petitioner's third hypothetical situation is, perhaps, the least applicable and least reasonable. If competent counsel had made the appropriate objection, the objection had been overruled, and the respondent had received a sentence of life without parole, this would not be an issue. Respondent could not and would not have appealed the submission of an aggravating circumstance which was not found. Appealing the improper submission of an invalid aggravating circumstance upon receipt of a life sentence would be tantamount to asking for an

advisory opinion, something the Arkansas appellate court declines to give. In fact, petitioner concedes that respondent would have lacked standing in this instance. Ultimately, had respondent received a sentence of life without parole he would not and could not have argued the invalidity of the pecuniary gain aggravating circumstance on appeal. Again, the prejudice suffered is apparent.

4. The petitioner's fourth hypothetical, which is termed the core of the argument accepted by the Eighth Circuit Court of Appeals, is factually what could and should have happened at respondent's trial. Competent counsel makes the objection that should have been made, and the trial court properly follows controlling authority and sustains the objection. Only the "avoiding apprehension" aggravating circumstance is submitted to the jury and the jury finds that the state's proof does not sustain a finding of the existence of this circumstance. Having failed to find the existence of at least one aggravating circumstance, the jury must sentence respondent to life without parole. This conclusion is dictated by law and involves no assumption whatsoever about the "process of decision" because the jury's rejection of the existence of additional aggravating circumstances, or the result of the jury's process of decision, is apparent on the face of the record. Again, the prejudice is apparent.

In short, the scenarios hypothesized by petitioner merely serve to demonstrate the actual prejudice suffered by respondent.

The petitioner next points out that in *United States v. Cronic*, 466 U.S. 648 (1984), this Court stated (internal citations omitted):

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. 'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. 'The very strength of our system is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' Unless the accused receives effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, even if defense counsel may have made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 655-56. In *Cronic* the Court emphasized that strong statements of position on both sides of a criminal proceeding are essential to the discovery of truth. In Fretwell's trial, because of counsel's ignorance of the law, no statement of position, strong or otherwise, was made

regarding the issue of the invalid aggravating circumstance, and there was therefore, no opportunity for the adversarial testing of the issue envisioned in *Cronic*. Neither the judge nor the jury had the opportunity to consider the issues which would otherwise have been put before them. Not only "a serious risk of injustice" developed, but an actual injustice occurred when Fretwell was sentenced to death.

Strickland and *Cronic* do not support the petitioner's contention that respondent suffered no prejudice when his counsel failed to make a *Collins*-based objection. To the contrary, they serve to focus the inquiry on the facts as they existed at the time of Fretwell's trial. Because counsel did not object, Fretwell received a death sentence. Fundamental fairness insuring a reliable result was not served. The jury was not acting according to law and Fretwell was shackled with a lawless decision. There is more than a reasonable probability that the outcome of the proceeding would have been different if counsel had objected – there is a virtual certainty.

C. *Nix v. Whiteside*, 475 U.S. 157 (1986).

Following its argument that respondent has not suffered prejudice and should not be entitled to the luck of a lawless decisionmaker, petitioner suggests that the case of *Nix v. Whiteside*, 475 U.S. 157 (1986), shows that Fretwell has not been deprived of a right conferred by the Constitution. In *Nix*, this Court held that trial counsel at defendant's murder trial was not ineffective when he successfully dissuaded the defendant from committing

perjury at his trial. The Court stated (internal citations omitted):

> We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. . . . According to *Strickland*, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.' The *Strickland* Court noted that the 'benchmark' of an ineffective assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'

Id. at 175. Justice Black, in a concurring opinion, stated:

> . . . the privilege every criminal defendant has to testify in his own defense 'cannot be construed to include the right to commit perjury.' To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right which the law simply does not recognize.

Id. at 185.

Petitioner emphasizes that the Court found that Whiteside had "no entitlement to the luck of a lawless decisionmaker", and suggests that respondent seeks the same entitlement. The lawless decisionmaker of which Whiteside sought to avail himself, however, was a jury which heard, believed and acted upon defendant's perjured testimony. Fretwell, on the other hand, seeks to avail himself of a jury which was properly instructed according to the law as it existed at the time of his trial.

While Whiteside admittedly had no right to perjure himself, Fretwell did have a right guaranteed by the Eighth Amendment to be free from the arbitrary imposition of the death penalty and a right to have his sentencing jury properly instructed on the law existing at the time.

The Solicitor General, in its amicus brief, asserts that Fretwell's claim is like Whiteside's because he seeks to avail himself of "a right the law simply does not recognize." Solicitor General's Brief, p. 14. This assertion ignores, as does the petitioner's argument, that under valid law as it existed at the time of Fretwell's trial, the relevant time-frame for purposes of analysis of an ineffective assistance claim, Fretwell did have a fundamental right, pursuant to the Eighth Amendment, to have the jury instructed according to existing law. The Solicitor General makes the broad statement, that "the Eighth Amendment confers no right on a defendant to prevent the jury from imposing the death penalty based on a factor that was also an element of the underlying offense." As this Court has noted, and as will be discussed in greater detail, *infra*, the Eighth Amendment does confer such a right under a statutory scheme which fails to narrow the class of death eligible offenders within the definition of the offense.

In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the Court stated:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Lowenfield held that in states such as Louisiana and Texas, aggravating circumstances which duplicate an element of the offense are harmless because aggravating circumstances are unnecessary for narrowing purposes under those statutes. Since the narrowing occurs through the definition of the offense, and is therefore served by the jury's findings at the guilt phase of the trial, it is of no constitutional concern for the jury to consider an aggravating circumstance during the penalty phase which fails to further narrow the class of death eligible offenders. Arkansas, on the other hand, does not narrow the class of death eligible offenders at the guilt phase by definition of the offense, and therefore falls within the second group of regimes of capital punishment discussed in *Lowenfield*, i.e., those where the legislature has more broadly defined capital offenses and provided for narrowing by jury findings of aggravating circumstances at the penalty phase. Therefore, the aggravating circumstances are indispensable as the only means by which the constitutionally mandated narrowing function may occur, and a circumstance which merely duplicates an element of the offense offers no meaningful distinction between the class of all guilty offenders and those who should receive the death penalty.

It is clear that the Constitution does not confer the right to commit perjury; hence, Whiteside's ineffective

assistance claim must fail. It is equally clear that the Eighth Amendment does confer a right to meaningful narrowing of the class of death eligible offenders, and that respondent was deprived of that right by his counsel's deficient performance. Again, Fretwell does not seek "entitlement to the luck of a lawless decisionmaker", such as the jury tainted by perjury in *Nix*, but asks only that he be given redress for the lawlessness which occurred in his trial due to counsel's deficient performance.

D. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

The case of *Kimmelman v. Morrison*, 477 U.S. 365 (1986), petitioner claims, sheds light on the prejudice analysis process necessary to resolution of this case. In *Kimmelman* the Court held that an ineffective assistance claim based on counsel's failure to timely discover and move to preclude admission into evidence certain illegally seized but reliable evidence, was not barred from review on federal habeas corpus by the limitation of *Stone v. Powell*, 428 U.S. 465 (1976). Petitioner makes an argument based on Justice Powell's concurring opinion in *Kimmelman* that the respondent suffered no prejudice herein because his trial was fundamentally fair. He further contends that granting respondent relief in this case is the equivalent of the "constitutional windfall" that the defendant in *Kimmelman* could have received. Justice Powell suggested that prejudice within the meaning of *Strickland* could never result from counsel's failure to obtain the suppression of reliable evidence. He stated, 477 U.S. at 396, that "the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict." Therefore, "the harm suffered by

respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall."

Just as Fretwell does not claim a right not conferred by the Constitution, neither does he claim entitlement to a windfall. The distinction between *Kimmelman* and this case is in the nature of the rights claimed, and the reasons the rights exist. As explained by Justice Powell "the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. We have held repeatedly that such evidence is excluded only for deterrence reasons that have no relation to the fairness of the defendant's trial." *Id.* at 397. And:

> The exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel.

Whereas,

> . . . the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial, a trial in which the determination of guilt or innocence is 'just' and 'reliable.'

Id. at 392-393. Fretwell's right to be free from the arbitrary imposition of the death penalty is a right no less personal and fundamental than his right to counsel. It is something to which he is entitled by the Constitution. To recognize that right in no way confers upon him a windfall such as a defendant would receive when illegally seized but reliable evidence is excluded from a trial. At the time of his trial Fretwell was entitled to receive the

benefit of *Collins*, and was only deprived of it by counsel's ineffective assistance. As a result, he was deprived of a fundamentally fair trial. The death sentence he received is neither just nor reliable, and should not stand.

E. The Continuing Validity of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied* 474 U.S. 1013 (1985).

As stated above, petitioner's argument for reversal in this case is dependent upon the overruling of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied* 474 U.S. 1013 (1985). It is respondent's contention that the case of *Perry v. Lockhart*, 871 F.2d 1384, *cert. denied* 493 U.S. 959 (1989), in which the Eighth Circuit overruled *Collins*, represents a misapplication of the holding in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988). *Lowenfield* does not overrule the "double-counting" prohibition of *Collins*, and the holding in *Perry* represents an over-expansion of *Lowenfield*.

Because of material differences in the Arkansas and Louisiana capital murder statutory schemes, the rule of *Lowenfield* does not necessarily extend to the Arkansas statutory scheme. The reasoning of *Collins* prevails and the case should not have been overruled.

In rejecting the argument that duplication of an element of the crime by its use as an aggravating circumstance rendered petitioner Lowenfield's sentence constitutionally infirm, this Court held the constitutionally required narrowing function in capital schemes could be accomplished either by narrowing the definition of capital offenses at the guilt stage or by providing for narrowing by jury findings of aggravating circumstances.

Lowenfield v. Phelps. The "narrowing" role aggravating circumstances play depends upon how narrowly a state defines capital offenses in the first instance. Correspondingly, whether an element of the crime may also be used as an aggravating circumstance depends upon the particular statutory scheme involved and the role the aggravating circumstances serve in obtaining the constitutionally mandated narrowing.

The Louisiana statute, as noted in *Lowenfield*, narrowly defines first degree murder (its capital offense) as follows:

> . . . the killing of a human being
>
> (1) when the offender has specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery or simple robbery;
>
> (2) when the offender has specific intent to kill or to inflict great bodily harm upon a fireman or police officer engaged in the performance of his lawful duties;
>
> (3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given or has received anything of value for the killing;

(5) when the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years.

La. Rev. Stat. Ann. § 14.30(A)

The Louisiana statute defines capital murder "as something more than intentional killing". *Sawyer v. Whitley*, ___ U.S. ___, 112 S. Ct. 2514, 2520, ___ L.Ed.2d ___ (1992). In Louisiana a defendant is not eligible for the death penalty unless found guilty of first degree murder, a category of murder more narrowly defined by statute than the general category of homicide. *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, ___ L.Ed.2d ___ (1992). Exposure to the death penalty occurs at the guilt stage only upon a showing of an intentional homicide and the commission of the homicide under circumstances constituting one of five statutory aggravating criteria. *Sawyer v. Whitley*, 112 S. Ct. at 2523. Thus, in essence, the Louisiana statute requires the jury to find the existence of statutory aggravating circumstances before a finding of guilt of capital murder, and before a defendant becomes death eligible.

Texas, like Louisiana, narrowly defines the category of murders that qualify for a finding of guilt of capital murder, and give rise to exposure to the death penalty. *Jurek v. Texas*, 428 U.S. 262, 270-271 (1976). Again, like the Louisiana statute, Texas' statute requires, before a finding of guilt, proof of both an intentional or knowing murder and its commission under certain statutory aggravating circumstances. Only after both of these findings are made may a defendant be found guilty of capital murder and thereafter exposed to the death penalty. V. Tex. C. A. Penal Code § 19.03.

The Arkansas statute defining capital murder under which Perry and respondent were tried, Ark. Code Ann. § 5-10-101, defines the offense in pertinent part as follows:

(a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary or escape in the first degree, and in the course or in furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.

The Louisiana and Arkansas definitions of felony murder differ in at least one important way: Louisiana requires a specific intent to kill or to inflict great bodily harm; Arkansas requires only that the killing occurred "under circumstances manifesting extreme indifference to the value of human life." There is no specific or general intent requirement in Arkansas. Arkansas defines capital murder as something far *less* than intentional killing. *Sawyer v. Whitley*, 112 S.Ct. at 2520. Thus, the Louisiana statute is far narrower in its definition of a capital offense than is the Arkansas statute.

This Court has compared the respective statutes of Arkansas and Louisiana on several occasions and reached a conclusion which was ignored or simply overlooked in *Perry*. In *Enmund v. Florida*, 458 U.S. 782, 790 n. 8, (1982), the Court concluded that Louisiana was one of eight states that "made knowing, intentional, purposeful or premeditated killing an element of capital murder."

Arkansas, on the other hand, was determined to be one of three that "require proof of a culpable mental state short of intent, such as recklessness or extreme indifference to the value of human life." *Id.*, at 790, 793-794 n. 15.

In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court revisited the *Enmund* analysis and again commented upon the differences between the Louisiana and Arkansas statutes. Louisiana, it stated, "forbids imposition of the death penalty even though the defendant's participation is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness." *Id.* at 154. Arkansas, it was noted, had held that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even in the absence of an intent to kill. See e.g. *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983)." *Ibid.*

Therefore, under *Enmund*, *Tison*, and *Lowenfield*, Louisiana can be said to have performed the narrowing function at the guilt phase of the trial, but the same statement cannot be made of Arkansas. Although *Tison* held that a mental state of reckless indifference, coupled with major participation in the felony, is sufficient to satisfy the *Enmund* culpability requirement, both *Enmund* and *Tison* implicitly recognized that this lesser cupable state pulls more defendants into the net of potential capital liability and exposure to the death penalty. This is particularly so because the Arkansas courts have given the phrase, "manifesting extreme indifference to the value of human life" such expansive and varying interpretations that the phrase can be applied to virtually any conduct which results in death. Consequently, in Arkansas, it is only at

the penalty phase, through weighing of aggravating circumstances against mitigation evidence, that the constitutionally mandated narrowing function occurs. And where, as in *Perry* and the instant case, an aggravating circumstance is duplicative of an element of the offense, the narrowing function is not accomplished and the sentence cannot stand under the Eighth Amendment.

The Arkansas statutory scheme differs from those of Texas and Louisiana in other material respects. Like the statutory schemes existing in Florida, see *Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114 (1992), and Mississippi, see *Stringer v. Black*, ___ U.S. ___, 112 S.Ct. 1130 (1992), Arkansas is a weighing state. Under Arkansas law, after a jury has found a defendant guilty of capital murder, and has also found the existence of at least one statutory aggravating circumstance, it is directed to weigh the aggravating factor or factors against all evidence presented in mitigation. This difference in the statutes is not one of semantics but "of critical importance". *Stringer v. Black*, 112 S.Ct. at 1137. The extreme importance of this mandatory weighing process under the Arkansas death penalty scheme has long been emphasized. *See, e.g., Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894 (1977). Because of the Arkansas requirement that the jury weigh statutory aggravating circumstance(s) against mitigating evidence, a requirement not found in either the Texas or Louisiana scheme, the rationale of *Lowenfield* is not applicable to the Arkansas scheme. *Stringer v. Black*, 112 S.Ct. at 1138; *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991) (distinguishing *Lowenfield* due to the weighing requirement under the Wyoming statute) and *State v. Middlebrooks*, ___ S.W.2d ___, No. 01-S-01-9102-

CR-00008 (Tenn. September 8, 1992) (distinguishing *Lowenfield* due to the failure of the Tennessee statute to narrow the class of death eligible offenders at the guilt stage).

Another, and perhaps more important distinguishing factor under Arkansas law, is that Arkansas is not only a weighing state like Mississippi and Florida, but it also is a "justification" state. A defendant found guilty of capital murder in Arkansas cannot be sentenced to death unless the jury, at the penalty phase, makes three separate findings. The jury must find the existence of at least one statutory aggravating circumstance. The jury must then weigh the aggravating circumstance or circumstances to determine whether they outweigh the mitigating evidence beyond a reasonable doubt. Finally, the jury must also make the determination that the aggravating circumstance or circumstances justify the sentence of death beyond a reasonable doubt. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981); *Collins v. Lockhart*, 754 F. 2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985); *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992).

The failure of the jury to make this third, independent finding results in a sentence of life without parole. Ark. Code Ann. § 5-4-603(c)(1987). The "justification" requirement underscores the fact that the constitutionally required narrowing function under Arkansas' statutory scheme can only occur at the penalty phase because an Arkansas capital defendant who has been found guilty of capital murder is not death eligible absent this finding by the jury. This is so even if the jury has engaged in the required weighing and determined that aggravating circumstances outweigh all the evidence in mitigation. If the

jury's consideration of aggravating factors during the sentencing phase is of no constitutional significance because the requisite differentiation among defendants for death penalty purposes has taken place during the jury's deliberation with respect to guilt, then the inclusion of the "weighing" and "justification" requirements in the Arkansas scheme can only be deemed a superfluous act on the part of the Arkansas legislature.

If the above requirements are of no constitutional significance, then as long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. *Stringer v. Black*, 112 U.S. at 1137. This is because there is no constitutional violation resulting from the introduction of an invalid factor in an earlier stage of the proceedings, provided the reviewing court determines the invalid factor would not have made a difference to the jury's determination. *Ibid.* Where either the weighing or the justification requirement is of constitutional narrowing consequence, a reviewing court cannot assume the invalid factor would not have made a difference, and only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee the defendant received an individualized sentence. *Ibid.*

The Arkansas Supreme Court has recognized the constitutional significance of both the weighing and justification requirements by refusing to reweigh remaining valid aggravating circumstances against mitigation, recognizing that the weighing process is "peculiarly a function best performed . . . in the first instance by a jury", *Giles v.*

State, 261 Ark. at 424. Further recognition of this principle is evidenced by the Arkansas Supreme Court's refusal to speculate whether a jury would nevertheless conclude any remaining valid aggravating circumstances justified a sentence of death beyond a reasonable doubt. *Williams v. State*, 274 Ark. at 12.

In 1987 the Arkansas statute was amended to mandate a harmless error appellate review when there is error in the jury's finding of the existence of an aggravating circumstance, the jury found no mitigating circumstance, and there exists remaining valid aggravating circumstances. Ark. Code Ann. § 5-4-603(d) & (e) (1987). In enacting this statute the state legislature recognized the important narrowing function performed by the weighing process because it precluded the appellate court from engaging in a harmless error analysis when weighing was performed by the sentencing jury. Harmless error analysis is only allowed when no mitigation was found by the jury, and thus, no weighing was performed. However, due to the important narrowing function these two requirements provide under Arkansas law, the state appellate court has yet to invalidate a jury finding in aggravation and determine the erroneous finding to be harmless. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992) and *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992).

A review of Arkansas appellate court decisions, and the statute itself, demonstrates that the constitutionally required narrowing function is, and has been since the statute's enactment, provided for by the weighing and justification requirements at the penalty phase. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992); contra,

O'Rourke v. State, 295 Ark. 57, 746 S.W.2d 52 (1988) (holding without explanation that the mandated narrowing function was performed at the guilt phase) compare, *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992) (noting at the time *O'Rourke* was decided the legislature had narrowed the class at both stages but that now the narrowing primarily occurs at the penalty phase).

Sixteen years of appellate decision and restatement undercut the conclusory statement in *O'Rourke* that the narrowing function is, or has ever been, performed at the guilt stage under the Arkansas statute, thereby negating the constitutional requirement of "an additional aggravating circumstance finding at the penalty phase". *O'Rourke*, 295 Ark. at 64.

In *Enmund*, this Court mentioned that although it was the final arbiter of Eighth Amendment jurisprudence, the judgments of legislatures were a factor to be considered and weighed heavily as relevant to the constitutional inquiry. 458 U.S. at 797. The importance of the legislatures' judgments was also recognized in *Tison*. The Court noted that many of the state statutes discussed in *Enmund* were unchanged, but, significantly, pointed out that other states had either modified their felony murder statues to require a finding of an intent to kill or at least intent to employ lethal force, or had eliminated felony murder as a capital offense altogether. 481 at 152, n. 4.

In evaluating the Arkansas statute, it is evident, that contrary to the narrowing response of other states to meet the concerns discussed in *Enmund*, Arkansas has not reevaluated its statute, but instead ignored *Enmund* and

its teachings by expanding its definition of capital murder. Rather than narrowing its definition of felony murder, Arkansas has expanded the definition of capital murder to include all premeditated and deliberate murders. As opposed to narrowing death eligible defendants at the guilt stage, Arkansas has not expanded the class of death eligible defendants under its statute to render it constitutionally infirm under *Furman v. Georgia*, 408 U.S. 238 (1972). The broad statutory interpretation of capital murder in Arkansas dispels any notion that it performs the constitutionally required narrowing function at the guilt phase, and makes indispensable the role of aggravating circumstances at the penalty phase. Therefore, any duplication in the myriad elements of the crime of capital murder invites arbitrariness and prohibits any meaningful narrowing at either stage. For this reason, *Lowenfield*, to the extent that it suggests that "double-counting" is permissible, is inapplicable to the Arkansas scheme and *Collins* should not have been overruled.

F. The Remedy for the Deprivation of Fretwell's Sixth Amendment Right to the Effective Assistance of Counsel

It is respondent's position that the only remedy which will remove the taint of prejudice which he has sustained is to unconditionally reduce his sentence to life without parole. To force Fretwell to face resentencing, without the benefit of the rule in *Collins*, would perpetuate the prejudice he suffered at his original trial. There is a "reasonable probability", as required under *Strickland's* test, if not a near certainty, that respondent would not have received the death sentence in the absence of his

counsel's ineffective assistance, and the fact that Collins was overruled does not change the situation.

As noted by petitioner, federal courts conducting habeas corpus review pursuant to 28 U.S.C. Sec. 2254(d) are to " . . . dispose of the matter as law and justice require." 28 U.S.C. Sec. 2243. Petitioner's Brief p. 57. This Court can and should affirm the decision of the Eighth Circuit to unconditionally reduce respondent's sentence to life without parole, the only meaningful remedy available.

CONCLUSION

The respondent was denied his Sixth Amendment right to the effective assistance of counsel at his state court capital murder trial, and, for this reason, the Court should affirm the opinion of the United States Court of Appeals for the Eighth Circuit granting relief to respondent.

Should the Court reach the issue of the applicability of *Lowenfield v. Phelps* to Arkansas' capital punishment scheme, it should recognize the significant distinctions between the Arkansas and Louisiana statutes, and should hold that *Lowenfield* does not apply to Arkansas.

Respectfully submitted,

RICKY R. MEDLOCK
(Appointed by this Court)
421 Main Street
P.O. Drawer 475
Arkadelphia, Arkansas 71923
Phone (501) 246-0303

Counsel for Respondent

No. 91-1393

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

A. L. LOCKHART, Director
Arkansas Department of Correction,
Petitioner,

v.

BOBBY RAY FRETWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

WINSTON BRYANT, ESQ.
Arkansas Attorney General

CLINT MILLER, ESQ.
Senior Assistant Attorney General

J. BRENT STANDRIDGE, ESQ.
Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-3657
Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

On September 18, 1992, respondent Fretwell filed his brief on the merits in the above-styled case. Also, on that same day, *amici curiae* filed a brief in support of respondent Fretwell's position. Petitioner Lockhart wishes to reply to the Eighth Amendment "genuine narrowing" argument made by respondent Fretwell in his brief and by Fretwell's *amici* in their brief.

I. THE DEFINITION OF FELONY-MURDER SET FORTH IN ARKANSAS STATUTE ANNOTATED § 41-1501(1)(a) (1977) GENUINELY NARROWS THE SET OF ALL MURDERERS INTO A SUBSET OF CERTAIN FELONY-MURDERERS THAT TRULY DESERVES TO DIE.

A. Introduction.

Both respondent Fretwell and the *amici curiae* who support his position argue in their briefs that the United States Eighth Circuit Court of Appeals erred in holding

in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989) that its previous "double-counting" holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985) was effectively overruled by this Court's holding in *Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988), that Louisiana's death penalty sentencing procedure satisfied the Eighth Amendment's requirement of genuine narrowing by narrowly defining the offense of capital murder. According to Fretwell and his *amici curiae*, the statutory death penalty sentencing procedure in Arkansas is so different from that in Louisiana that the Eighth Circuit Court of Appeals erred in concluding in *Perry* that *Lowenfield* was authority for the proposition that Arkansas' death penalty sentencing procedure performed the genuine narrowing required by the Eighth Amendment at the definitional stage of capital murder. Petitioner Lockhart disagrees. Both Fretwell and his *amici curiae* are wrong when they contend that Arkansas' death penalty sentencing procedure does not perform the requisite genuine narrowing at the definitional stage of capital murder, given Arkansas' narrow definition of capital felony murder. Lockhart makes this argument only with regard to the definition of capital felony murder, which is the type of capital murder at issue in the instant case. As will be noted in subsection C, *infra*, Arkansas' present definition of capital murder as "premeditated and deliberated" murder does not perform the requisite genuine narrowing at the definitional stage of capital murder. As will be noted in subsection C, *infra*, as of 1989, when killing a single victim with premeditation and deliberation became a capital offense in Arkansas, the requisite genuine narrowing for such murderers occurs in the penalty stage of Arkansas' death penalty sentencing procedure.

Lockhart concedes that the issue of whether Arkansas' definition of capital felony murder performs the requisite genuine narrowing is properly before this Court as part of Fretwell's Sixth Amendment claim of deprivation of

his right to the effective assistance of counsel at the penalty phase of his capital felony murder trial. Fretwell raised this issue in his brief to the Eighth Circuit Court of Appeals. Fretwell's brief to the Eighth Circuit Court of Appeals at 5-9. In its *Fretwell* opinion the Court of Appeals noted that any challenge that Fretwell would have made to the validity of Arkansas' death penalty sentencing procedure on the basis that it failed to perform the genuine narrowing required by the Eighth Amendment ". . . would fail under a retroactive application of *Lowenfield*." *Fretwell*, 946 F.2d at 577 n.8. Lockhart specifically waives any procedural bar-type arguments based on this Court's holding in *Wainwright v. Sykes*, 433 U.S. 72 (1977) to this Court's addressing, either as a Sixth Amendment issue or as an Eighth Amendment issue, whether Arkansas' definition of capital felony murder performs the genuine narrowing required by the Eighth Amendment.

B. Arkansas' Death Penalty Sentencing Procedure Does Not Define All Felony Murder as Capital Felony Murder and in 1985 in Arkansas Only Seven Types of Felony Murder Were Considered Capital Felony Murder.

Lockhart submits that one way in which Arkansas' capital punishment sentencing procedure genuinely narrows the class of all murderers into a subclass of those that truly deserves to die is by limiting its definitions of capital felony murder.[1] In Arkansas in 1985 when Fretwell committed the robbery-murder at issue, the definition of capital felony murder was set forth in Arkansas Stat-

---

[1] The "genuine narrowing" required by the Eighth Amendment requires of a state's death penalty sentencing procedure that it narrow the set of all murderers into a subset that truly deserves to die. *See Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983) and *Godfrey v. Georgia*, 446 U.S. 420 (1980).

ute Annotated § 41-1501(1)(a) (1977).[2] Section 41-1501 (1)(a) limits the definition of capital felony murder to killings that are committed in the course of rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree. Fretwell was convicted of one of these capital felony murders, robbery-murder. It is simply not true, as Fretwell and his *amici curiae* suggest, that Arkansas defines all felony murder as capital felony murder. In 1985, if a defendant caused the death of another human being in the course of committing a felony and that felony was not one of the seven felonies listed in § 41-1501 (1)(a), then the defendant could not have been convicted of capital felony murder and, therefore, would not have been eligible for the death penalty.

Admittedly, such cases were rare in 1985 and are rare today under Arkansas' present definition of capital felony murder.[3] However, in 1989 the Arkansas Supreme Court affirmed a first degree felony murder conviction where the defendant had caused the death of another person in the course of committing the felony offense of theft by receiving, *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989). In *Hall* the defendant committed the felony offense of theft by receiving by having received and having retained

[2] Arkansas Statute Annotated § 41-1501(1)(a) (1977) states:

"A person commits capital murder if:

acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtheranec of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . ." [Arkansas Statute Annotated § 41-1501(1)(a) is presently codified as Arkansas Code Annotated § 5-10-101(a)(1) (Supp. 1991).]

[3] Arkansas' present definition of capital felony murder, codified as Arkansas Code Annotated § 5-10-101(a)(1) (Supp. 1991), is the same as the definition of capital felony murder set forth in § 41-1501(1)(a) (1977) except that the present definition of capital felony murder adds the predicate felony offense of delivery of a controlled substance.

possesesion of a stolen automobile. In *Hall* the defendant killed another person in the course of committing theft by receiving by running over a bystander as he fled in the stolen automobile from the police. This decision by the Arkansas Supreme Court demonstrates that Arkansas' capital punishment sentencing procedures does narrow the set of all murderers into a subset by excluding some types of felony murder from the definition of capital murder.

C. The Attendant Circumstance Set Forth in Arkansas Statute Annotated § 41-1501(1)(a) (1977) of ". . . Under Circumstances Manifesting Extreme Indifference to the Value of Human Life . . ." Has Been Interpreted by the Arkansas Supreme Court to Be the Equivalent of the Culpable Mental State of Intent.

Lockhart submits that Arkansas' capital punishment sentencing procedure as it existed in 1985 and as it exists today performs the requisite genuine narrowing of the set of all murderers into a subset that truly deserves to die because Arkansas' definition of capital felony murder includes the attendant circumstance of "under circumstances manifesting extreme indifference to the value of human life" and the Arkansas Supreme Court has interpreted this attendant circumstance to be the equivalent of the culpable mental state of intent. Both Fretwell and his *amicus curiae* argue in their brief that Arkansas failed to narrow its definition of capital felony murder in response to this Court's landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972). This assertion by Fretwell and his *amici curiae* is wrong.

- Prior to *Furman*, capital murder in Arkansas was defined in Arkansas Statute Annotated § 41-205 (Repl. 1964) as follows:

> All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or

> in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree.

In 1975, three years after this Court's decision in *Furman*, Arkansas narrowed the definition of capital felony murder by reformulating the offense into the form it has in Arkansas Statute Annotated § 41-1501(1)(a). Specifically, Arkansas narrowed its definition of capital felony murder by adding the attendant circumstances of ". . . under circumstances manifesting extreme indifference to the value of human life. . . ." Both Fretwell and his *amicus curiae* assert that this attendant circumstance amounts to nothing more than the culpable mental state of "recklessly" and that all felony murderers occur "under circumstances manifesting extreme indifference to the value of human life." (Fretwell's brief at 25-26 and Fretwell's *amici curiae* brief at 15; 19-20) This assertion by Fretwell and his *amici curiae* is incorrect. The Arkansas Supreme Court has interpreted the attendant circumstance "under circumstances manifesting extreme indifference to the value of human life" set forth in the statutory definition of first degree battery as being the equivalent of the culpable mental state of intent. The Arkansas Supreme Court has so held in the cases of *Nolen v. State*, 278 Ark. 17, 21-2, 643 S.W.2d 257, 259-60 (1982) and *State v. Vowell*, 276 Ark. 258, 634, S.W.2d 118 (1982). Both *Nolen* and *Vowell* involved defendants who, while driving while intoxicated, caused automobile crashes, thereby causing injury to other persons. Although neither *Nolen* nor *Vowell* were cases involving a charge of felony murder, in both cases the Arkansas Supreme Court stated that it considered the attendant circumstance "under circumstances manifesting extreme indifference to the value of human life" to be in the nature of a culpable mental state and to be akin to intentional conduct. The limitation imposed on the definition of capital felony murder by the Arkansas Supreme Court's interpretation in *Nolen* and *Vowell* of the attendant circumstance "under circumstances manifesting extreme indifference to the value of human life" distinguishes Arkansas' capital punishment sentencing procedure from that in other jurisdictions, notably Tennessee and Wyoming. Fretwell and his *amicus curiae* rely on recent state supreme court decisions from these two states to buttress their contention that Arkansas' capital punishment sentencing procedure does not perform the requisite genuine narrowing.

The state supreme court decisions that Fretwell and his *amicus curiae* rely on are the decisions by the Tennessee Supreme Court in *State v. Middlebrooks*, No. 01-S-01-9102-CR-00008 (Tenn. Sept. 8, 1992) and by the Wyoming Supreme Court in *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). The definitions of capital felony murder at issue in *Middlebrooks* and *Engberg* did not have the attendant circumstance of "under circumstances manifesting extreme indifference to the value of human life," much less an interpretation of that attendant circumstance that treated it as the equivalent of the culpable mental state of intent. The definition of capital felony murder at issue in *Middlebrooks* defined the offense, in pertinent part, as, "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb." *Middlebrooks*, slip op. at 37-8. The definition of capital robbery murder at issue in *Engberg* defined the offense as, "[w]hoever . . . in the perpetration of, or attempt to perpetrate, any . . . robbery . . . kills any human being . . . is guilty of murder in the first degree. *Engberg*, 820 P.2d at 87. Given the interpretation of the attendant circumstance, "under circumstances manifesting extreme indifference to the value of human life" by the Arkansas Supreme Court in *Nolen* and *Vowell*, Arkansas' definition of capital felony murder is substantially narrower than the definition of capital felony murder at issue in *Middlebrooks* and at issue in *Engberg*.

Lockhart notes that Fretwell's *amici curiae* cite the *Middlebrooks* decision and seem to assert in their brief that just because a state's definition of capital felony murder meets the standard set forth by this Court in *Tison v. Arizona*, 481 U.S. 137 (1987), that definition of capital felony murder does not necessarily perform the genuine narrowing required by the Eighth Amendment. Fretwell's *amici curiae* brief at 15 (citing *Middlebrooks*, slip op. at 63). This contention by Fretwell's *amici curiae* and the decision by the Tennessee Supreme Court in *Middlebrooks* are in error. This Court's decision in *Tison* does not directly address the "genuine narrowing" issue posed in the instant case, but instead addresses the issue of whether the death penalty is permitted by the Eighth Amendment as a proportional punishment for certain kinds of felony murder. In *Tison* this Court held that the Eighth Amendment prohibits the imposition of the death penalty on the defendant in a capital felony murder case unless the state proves that the defendant killed the victim or intended that the victim be killed or acted with reckless indifference to the possibility of the victim's death. The Arkansas Supreme Court has specifically held that Arkansas' definition of capital felony murder meets the *Tison* standard. *Burnett v. State*, 295 Ark. 401, 411-12, 749 S.W.2d 308, 314 (1988). Lockhart submits that if a state's definition of capital felony murder meets the *Tison* standard, then that definition of capital felony murder must also perform the genuine narrowing required by the Eighth Amendment. If death is a proportional punishment, in Eighth Amendment terms, for a particular type felony murder, then the definition of felony murder at issue must genuinely narrow the class of all murderers into a subset that truly deserves to die. The Eighth Amendment does not require, as the Tennessee Supreme Court holds in *Middlebrooks*, that a statutory definition of capital felony murder genuinely narrow the set of all felony murders who meet the *Tison* standard into a smaller subset of felony murderers—all that the Eighth Amendment requires of states that perform the required genuine narrowing at the definitional stage of capital felony murder is that the definition of capital felony murder genuinely narrow the set of all murderers into a subset that truly deserves to die. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983) (a state's capital sentencing procedure ". . . must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

Lockhart notes also that Fretwell's *amici curiae* devote two pages of their brief to a discussion of a recent decision by the Arkansas Supreme Court, *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992). Fretwell's *amici curiae* brief at 14-5. Fretwell's *amici curiae* cite *Johnson* for the proposition that the Arkansas Supreme Court itself has stated that Arkansas' death penalty sentencing procedure carries out the genuine narrowing required by the Eighth Amendment at the penalty stage of capital murder trials, rather than at the definitional stage of capital murder. *Johnson*, 308 Ark. at 16, 823 S.W.2d at 805. Lockhart submits that the discussion by the Arkansas Supreme Court in *Johnson* of Arkansas' death penalty sentencing procedure is inapposite to the instant case. *Johnson* did not involve the capital offense of robbery-murder but involved, instead, the capital offense of the premeditated and deliberated killing of a single victim. As the Arkansas Supreme Court notes in *Johnson*, the premeditated and deliberated killing of a single victim was not even defined as capital murder in Arkansas until 1989. *Johnson*, 308 Ark. at 15-6, 823 S.W.2d at 805. Lockhart would concede that for defendants who are convicted of capital murder on a theory of killing a single victim with premeditation and deliberation, the genuine narrowing required by the Eighth Amendment would occur at the penalty phase of the defendant's trial, where, pursuant to the weighing component of Arkansas' death penalty sentencing procedure, the jury would find if any

aggravating circumstances exist beyond a reasonable doubt and then would weigh them against any mitigating circumstances found to exist in order to determine if the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. In any event, the instant case does not involve the theory of capital murder set forth in *Johnson*, the premeditated and deliberated killing of a single victim, and this definition of capital murder did not exist in 1985 when Fretwell committed the robbery-murder at issue.

D. The "Weighing" Element of Arkansas' Death Penalty Sentencing Procedure Has No Bearing on Whether the Definition of Felony-Murder Set Forth in Arkansas Statute Annotated § 41-1501(1)(a) Genuinely Narrows the Set of All Murderers Down to a Subset That Truly Deserves To Die.

Both Fretwell and his *amici curiae* make must- of the fact that Arkansas has a "weighing" component in its death penalty sentencing procedure. In 1985 and also today Arkansas requires that jurors who are deliberating whether to impose the death penalty on a defendant weigh the aggravating circumstances present against any mitigating circumstances present and also requires that the jurors conclude that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Arkansas Statute Annotated 41-1302(1)(b) (1977) (presently codified as Arkansas Code Annotated § 5-4-603(a)(2) (Supp. 1991)). Fretwell's *amici curiae* devote a great deal of argument to this point using this Court's recent decision in *Stringer v. Black*, 503 U.S. ——, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) as the spearhead of their attack. Fretwell's *amici curiae* brief at 25-29.

In *Stringer v. Black* the issue was whether this Court's decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (1990) established a "new rule" for purposes of the application of the

retroactivity doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989) with regard to the claim by a Mississippi death row inmate that his death sentence was invalid because the jury that sentenced him to death had weighed an invalid aggravating circumstance. In *Stringer v. Black* this Court held that *Maynard v. Cartwright* and *Clemons v. Mississippi* did not establish a "new rule" for *Teague v. Lane* retroactivity purposes and, therefore, the defendant's death sentence was violative of the Eighth Amendment because the jury had weighed an invalid aggravating circumstances. In its opinion in *Stringer v. Black* this Court noted that the issue present in the case had little to do with the "genuine narrowing" issue that was decided in *Lowenfield v. Phelps*. *Stringer v. Black*, 112 S.Ct. at 1139, 117 L.Ed.2d at 382. Lockhart makes the same observation about the argument based on *Stringer v. Black* presented by Fretwell's *amici curiae*— it has very little to do with the Eighth Amendment genuine narrowing issue that is before the Court in the instant case.

The "weighing" component of the various capital punishment sentencing procedures that were at issue in *Stringer v. Black* and this Court's prior decisions leading to *Stringer v. Black* were the focus of Eighth Amendment analysis by this Court solely because the jurors' weighing of aggravating circumstances in the respective cases was alleged to be violative of the Eighth Amendment because, in each case, the jury had considered an invalid aggravating circumstance. The invalid aggravating circumstance at issue in *Stringer v. Black*, in *Maynard v. Cartwright* and in *Clemons v. Mississippi* was the aggravating circumstance of "especially heinous, atrocious, or cruel." In *Maynard v. Cartwright* this Court had held that this aggravating circumstance was invalid because it was so vague that a person of ordinary sensibility could find the aggravating circumstance present in almost every murder. *Maynard v. Cartwright*, 486 U.S. at 363-64. Whatever else they have had to say about

the aggravating circumstances of "pecuniary gain," the aggravating circumstance involved in the instant case, neither Fretwell nor his *amici curiae* has stated that pecuniary gain was so vague that a person of ordinary sensibility could find it present in almost every murder.

If, as Lockhart contends, the statutory definition of robbery-murder set forth in Ark. Stat. Ann. § 41-1501 (1)(a) performs the genuine narrowing required by the Eighth Amendment, then the "weighing" component of Arkansas' death penalty sentencing procedure is not tainted. If the statutory definition of robbery-murder performs the genuine narrowing required by the Eighth Amendment, then "pecuniary gain" is a valid aggravating circumstance. If valid aggravating circumstances are weighed by the jury, then *Stringer v. Black* and this Court's prior decisions leading to it are not applicable.

E. Pecuniary Gain Is Not an Element of Arkansas' Definition of the Offense of Robbery.

In the brief filed by Fretwell's *amici curiae*, they state that "pecuniary gain" is an element of the offense of robbery and, therefore, is an element of the capital felony murder offense of robbery-murder. This assertion by Fretwell's *amici curiae* is incorrect. The Arkansas Supreme Court has never interpreted the offense of robbery to require evidence of "pecuniary gain" to prove the statutory elements of robbery. In 1985 (and today) Arkansas defined robbery in Ark. Code Ann. § 5-12-102(a) (1987) as follows:

> A person commits robbery if, with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

The Arkansas Supreme Court has consistently interpreted this statutory definition of robbery not to require proof by the State that the defendant ever actually took property from the victim and has consistently held that the

offense is complete when the defendant employs or threatens to employ physical force. *Birchett v. State*, 294 Ark. 176, 180-81, 741 S.W.2d 267, 270 (1987); *Novak v. State*, 287 Ark. 271, 273-74, 698 S.W.2d 499, 501 (1985); *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983); and *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980). Synthesis of the *Birchett-Higgins* line of cases proves that in 1985 (and today) pecuniary gain was not an element of Arkansas' statutory definition of robbery; therefore, pecuniary gain was not an element of the crime of robbery-murder in 1985 (and is not today). To prove that the defendant committed robbery-murder, the state would have to prove robbery—to do so it would not have to prove that the defendant realized a pecuniary gain.

Pecuniary gain, clearly understood, was (and is) a motive for robbery-murder rather than an element of the offense itself. Pecuniary gain's true nature, as a motive for robbery-murder rather than an element of the crime, can be seen if one considers the hypothetical situation of two sisters, one of whom murders the other in order to take away from the victim a family heirloom prized for its sentimental value but of no pecuniary value, in the sense of market value, whatsoever. In this hypothetical case, murder was committed to facilitate a robbery for gain, but the gain was not a pecuniary gain. To convict the hypothetical sister of robbery-murder, the state would not be *required* to prove her motive, pecuniary or otherwise. *See Still v. State*, 294 Ark. 117, 740 S.W.2d 926 (1987) and *Ederington v. State*, 244 Ark. 1096, 1104, 428 S.W.2d 271, 275 (1968).

Lockhart concedes that pecuniary gain is a common motive for robbery but it is not the only conceivable motive for robbery. For example, a defendant convicted of robbery-murder could argue to the jury that he did not commit the offense in order to realize a pecuniary gain, but instead committed the offense because a complex interweaving of deep-seated psychological and social factors

compelled him to commit robbery in order to achieve a sense of well-being arising from domination over and control of a helpless victim. *See* John Conklin, *Robbery and the Criminal Justice System*, 79-80 (1972) and Jack Katz, *Seductions of Crime*, 218-36 (1988). On the basis of expert testimony, such a robber-murderer could plausibly argue in the penalty phase of capital felony murder trial that he did not commit the robbery-murder at issue in order to realize a pecuniary gain, but did it, instead, to satisfy a psychological need.

In summary, Fretwell's *amici curiae* simply are incorrect when they assert that pecuniary gain is an element of the offense of robbery as defined in Arkansas. Pecuniary gain is not an element of robbery and, therefore, is not an element of the offense of robbery-murder. Because pecuniary gain is not an element of the offense of robbery-murder it is not an automatic aggravating circumstance in every robbery-murder case—a jury must find that the aggravating circumstance of pecuniary gain exists beyond a reasonable doubt, and the jury is not required to do so.

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Fretwell suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court is based on an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court reverse the holding of the Eighth Circuit Court of Appeals in the instant case and, in so doing, hold that respondent Fretwell was not deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court. Petitioner Lockhart respectfully requests

further that this Court deny respondent Fretwell any relief whatsoever.

Respectfully submitted,

WINSTON BRYANT, ESQ.
Arkansas Attorney General

CLINT MILLER, ESQ.
Senior Assistant Attorney General

J. BRENT STANDRIDGE, ESQ.
Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-3657
Counsel for Petitioner

No. 91-1393

In the Supreme Court of the United States

OCTOBER TERM, 1992

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, PETITIONER

v.

BOBBY RAY FRETWELL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a writ of habeas corpus may issue to a prisoner based on a claim that his counsel was ineffective in failing to make an objection that might have been successful at the time but that a subsequent decision of this Court has shown to be meritless.

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INTEREST OF THE UNITED STATES

This case presents the question whether a federal court may grant a writ of habeas corpus when a defendant's lawyer fails to raise an issue that may have benefited his client at the time, but which has subsequently been shown (by virtue of a decision of this Court) to be without merit. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the principles established in this case would likely apply to collateral attacks mounted by federal prisoners under 28 U.S.C. 2255. The United States therefore has a significant interest in the Court's analysis and decision in this case.

STATEMENT

1. On December 14, 1984, respondent Bobby Ray Fretwell entered the home of Sherman Sullins, a resident of Marshall, Arkansas, stole his money at gunpoint, and shot him dead. Respondent and two companions then fled in Sullins' pick-up truck. Pet. App. A22. Respondent was tried for the crime in an Arkansas state court in August 1985. The jury convicted him of capital felony murder and sentenced him to death. *Id.* at A23.

During the penalty phase, the prosecutor argued that the evidence presented at the guilt phase showed the existence of two aggravating circumstances: that the murder was committed for pecuniary gain, and that the murder was committed to facilitate respondent's escape. Respondent's counsel argued that no aggravating circumstances had been proved and that respondent's difficult and disadvantaged childhood was a mitigating circumstance. Pet. App. A23. The jury found no mitigating circumstances and one aggravating circumstance—that respondent had committed the murder for pecuniary gain. The jury then sentenced respondent to death. *Id.* at A23-A24.

2. Respondent appealed his conviction and sentence to the Supreme Court of Arkansas. One question raised in that court was whether respondent's sentence should be reversed in light of *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985). In *Collins*, the Eighth Circuit had held that a jury may not impose the death penalty on the basis of an aggravating circumstance that duplicates an element of the underlying felony. Under the *Collins* rule, it was improper for the jury to consider pecuniary gain as an aggravating circumstance, because pecuniary gain was an element of respondent's offense—murder in the course of a robbery. Because

respondent had not objected to the sentencing proceeding on that ground in the trial court, the Arkansas Supreme Court declined to decide whether it would adopt the Eighth Circuit's position in *Collins*. Rejecting the remainder of respondent's claims, the court affirmed his conviction and sentence. *Fretwell* v. *State*, 708 S.W.2d 630, 634 (Ark. 1986).

In his direct appeal, respondent did not raise any claim of ineffective assistance of counsel, see *Fretwell* v *State*, 708 S.W.2d at 631-634. In a subsequent state habeas corpus proceeding, however, respondent argued that his counsel had rendered ineffective assistance by failing to raise a *Collins*-based objection at the penalty phase of his trial. See *Fretwell* v. *State*, 728 S.W.2d 180, 181-183 (Ark. 1987). The Arkansas Supreme Court rejected that claim because, at the time of respondent's trial, the Arkansas courts had not passed on the question decided in *Collins*. The state supreme court observed that "[a]n attorney is not ineffective for failing to raise every novel issue which might conceivably be raised." 728 S.W.2d at 181. The court denied respondent's petition for post-conviction relief.

3. On May 27, 1987, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Arkansas. He claimed that his attorney had failed to provide effective assistance of counsel at the suppression hearing, the guilt phase, and the penalty phase of his trial, and that the trial court had erred in refusing to set aside the verdict as being contrary to the evidence. Pet. App. A24-A25. The district court rejected all of respondent's claims except the one based on counsel's failure to object to the submission of pecuniary gain as an aggravating circumstance.

In assessing that claim, the district court observed that the Eighth Circuit had decided *Collins* seven months before respondent's trial. The district court concluded that, "[a]s an attorney representing a defendant in a capital murder case, trial counsel had a duty to be aware of all law relevant to death penalty cases." Counsel's failure to bring *Collins* to the trial court's attention and interpose an objection to the jury's consideration of pecuniary gain as an aggravating circumstance was a "serious and significant error," the court concluded. Pet. App. A27. The district court noted that *Collins* was no longer good law in light of *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988); in that case, this Court held that the Constitution permits a State to treat a factor as an aggravating circumstance even though that factor is also an element of the underlying offense. See Pet. App. A27 n.2.[1] The court nevertheless ruled that counsel's failure to object to the consideration of pecuniary gain prejudiced respondent.

Because *Collins* "was the law in the Eighth Circuit" at the time of respondent's trial, the district court expressed confidence "that the trial court would have followed the ruling in *Collins* had trial counsel made an appropriate motion." Pet. App. A28. The court noted that the jury had found pecuniary gain to be the only aggravating circumstance. Had the trial court declined to submit the issue of pecuniary gain to the jury, the district court reasoned, "the jury would have had no option but to sentence petitioner to life imprisonment without parole." The district court therefore vacated respondent's sentence

[1] The Eighth Circuit formally overruled *Collins* in *Perry* v. *Lockhart*, 871 F.2d 1384, cert. denied, 493 U.S. 959 (1989), which relied on this Court's decision in *Lowenfield*.

and ordered that, unless Arkansas undertook to hold another sentencing proceeding, his sentence would be reduced to life imprisonment without parole. *Ibid.*

4. The court of appeals affirmed in part and remanded with directions that respondent's sentence be reduced to life imprisonment without parole. Pet. App. A1-A14. In considering respondent's ineffective assistance claim, the court stated that relief was appropriate under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), if "(1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced petitioner's defense." Pet. App. A5-A6. The court first rejected the State's contention that the trial court would have "overrule[d] a *Collins* objection" on the ground that *Collins* was inconsistent with this Court's decisions in *Jurek* v. *Texas*, 428 U.S. 262 (1976), and *Zant* v. *Stephens*, 462 U.S. 862 (1983). According to the court of appeals, those cases involved "significantly different" sentencing schemes from the one that was at issue in *Collins*. Pet. App. A6-A8.

The court of appeals then considered "whether a state trial court would have sustained a *Collins* objection to the instruction on pecuniary gain as an aggravating circumstance." Pet. App. A12. The court reasoned that because "the precedent that existed at the time of [respondent's] trial was not clearly inconsistent with *Collins* and since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins* had Fretwell's attorney made one." *Id.* at A12-A13. Because there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at A13 (quoting *Strickland*, 466 U.S. at 694), the

court concluded that respondent had suffered prejudice of the kind required to make out a claim of ineffective assistance of counsel.

The court of appeals disagreed with the district court's order in one respect. The district court had offered the State the option of holding another sentencing proceeding if it wished to seek the death penalty. The court of appeals held that respondent should not be subject to a resentencing proceeding at which he might be sentenced to death. To conduct a resentencing proceeding under current law, the court of appeals stated, "would perpetuate the prejudice caused by the original sixth amendment violation." The court therefore directed the district court to modify its order "to reduce unconditionally [respondent's] sentence to life imprisonment without parole." Pet. App. A14.

Judge Loken dissented. Pet. App. A14-A20. He observed that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at A15 (quoting *Strickland*, 466 U.S. at 686). To establish prejudice under *Strickland*, Judge Loken concluded, respondent had to show not only that his sentence "probably would have been different had his counsel made a *Collins* objection," but also that the "ineffective assistance of counsel has deprived him of a fundamentally fair sentencing, or of a specific constitutional right designed to guarantee a fair sentencing." Pet. App. A15-A16, A17. Since the decision in *Lowenfield* "established that [respondent's] sentencing jury was given instructions that did not violate his Eighth Amendment rights" (Pet. App. A17), Judge Loken concluded that respondent's sentencing proceeding

was neither unreliable nor unfair, and that counsel's conduct therefore did not prejudice respondent.

Judge Loken also found error in the majority's refusal to permit the State an opportunity to conduct another sentencing proceeding. As an initial matter, Judge Loken disagreed with the majority's premise that the sentencing jury, to which two aggravating circumstances were submitted, would have returned a verdict of life imprisonment if the issue of pecuniary gain had been withheld. Pet. App. A18. Beyond that, he noted that, by forbidding Arkansas from seeking the death penalty at a resentencing proceeding, the court of appeals "mandat[ed] a procedure in the name of *Collins*, an overruled case, that neither *Collins* nor the Constitution *ever* required." *Id.* at A19 (emphasis in original). Judge Loken reasoned that, "because *Lowenfield* is now the law, Arkansas must be permitted to instruct the jury at [respondent's] resentencing that pecuniary gain is a potential aggravating circumstance." *Ibid.* He concluded that "the nature of the federal habeas corpus remedy compels this result, for it is surely beyond our habeas corpus powers to prohibit the state from conducting the resentencing proceeding in a manner wholly consistent with the Constitution." *Id.* at A20.

SUMMARY OF ARGUMENT

I. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed inadequately and that the defective representation affected the outcome of the trial. But it is not enough that the outcome would have been different; counsel's error also must have denied the defendant a right to which he is entitled.

The court of appeals found that respondent's counsel performed inadequately when he failed to raise

an objection to the use of pecuniary gain as an aggravating circumstance at sentencing when pecuniary gain was established in the course of proving the underlying offense. The court also found that counsel's failure to raise that issue affected the outcome of the sentencing proceeding, since at the time of respondent's trial, an Eighth Circuit decision held that such "double counting" was impermissible. In the court's view, that was enough to justify relief in this habeas corpus action. That conclusion was erroneous for two reasons.

First, more recent decisions from this Court and from the Eighth Circuit have made it clear that "double counting" is permissible; that is, a State may treat as an aggravating circumstance a factor that is also an element of the underlying offense. Therefore, it is now clear that respondent was not entitled to have the trial court instruct the jury to disregard pecuniary gain as a potential aggravating circumstance. Because counsel's failure to raise the *Collins* issue at trial did not deprive respondent of any right to which he was entitled, he has failed to establish the prejudice that is an essential element of an ineffective assistance claim.

Second, respondent has failed to establish the most fundamental requirement of habeas corpus relief: he has not shown that he is currently being held in violation of the Constitution. Instead, the most that he has shown is that his sentence was imposed at a time when the Eighth Circuit believed, incorrectly as it turns out, that sentencing proceedings such as his were constitutionally flawed. If respondent had challenged his sentencing proceeding on direct appeal and the issue had reached this Court, he would not have been entitled to relief on the ground that at the time of his trial the Eighth Circuit believed that

the Arkansas sentencing scheme was invalid. He should not be entitled to *greater* relief on habeas corpus after having failed to raise the issue at trial or on appeal and having instead raised it indirectly through a claim of ineffective assistance of counsel on collateral attack.

II. Even if respondent is entitled to habeas corpus relief, he is not entitled to be free from a resentencing proceeding at which the State may seek the death penalty through application of a constitutionally valid sentencing scheme. When a federal habeas court grants relief from a state conviction or sentence, it ordinarily permits the State to cure the constitutional error by conducting another proceeding that accords with constitutional standards. In this case, because the Constitution authorizes the State to use pecuniary gain as an aggravating circumstance, there is no reason to bar the State from conducting a new sentencing hearing at which it will be entitled to show, as an aggravating circumstance, that respondent committed the robbery-murder for pecuniary gain.

ARGUMENT

I. RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE HIS ATTORNEY'S ERROR DID NOT PREJUDICE HIS RIGHT TO A FAIR SENTENCING PROCEEDING

The court of appeals held that respondent's counsel should have objected to the use of pecuniary gain as an aggravating circumstance in his sentencing proceeding. If counsel had done so, according to the court of appeals, the state court probably would have followed the Eighth Circuit's then-applicable decision in *Collins* v. *Lockhart*, 754 F.2d 258, cert. denied, 474 U.S. 1013 (1985), and would have ruled in his

favor on that point. Absent that aggravating circumstance, the court of appeals determined, the result of the sentencing proceeding would have been different. Because counsel's error affected the outcome of the case, the court of appeals concluded that respondent was prejudiced within the meaning of *Strickland* v. *Washington*, 466 U.S. 668 (1984).

There is a basic flaw in the court of appeals' reasoning. In light of this Court's decision in *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), it is now clear that it was not error for the state court to permit the jury to consider pecuniary gain as an aggravating circumstance for sentencing purposes. Counsel's omission therefore did not deprive respondent of any right to which he was entitled; at most, counsel's error deprived respondent of the chance to have the state court make an error in his favor. And the loss of a chance for a constitutional windfall cannot support a finding of ineffective assistance of counsel.

A. A Defendant Is Not Denied The Effective Assistance Of Counsel If His Lawyer Fails To Present A Claim That Is Ultimately Determined To Lack Merit

The court of appeals' analysis reflects a misunderstanding of the nature and purpose of the Sixth Amendment right to counsel. The Sixth Amendment guarantee of the right to the assistance of counsel at a criminal trial is designed "to assure fairness in the adversary criminal process." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Thus, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984).

Counsel's assistance is "the means through which the other rights of the person on trial are secured." *United States* v. *Cronic*, 466 U.S. at 653; see also *Maine* v. *Moulton*, 474 U.S. 159, 168-170 (1985).

"The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986). Fairness of the proceedings and reliability of the verdict are central to the right. "Absent some effect of [counsel's] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. Thus, it is not enough for a defendant to show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The defendant must also demonstrate that counsel's conduct deprived him of a fundamentally fair trial or sentencing, or of a specific constitutional right designed to guarantee a fair trial or sentencing.

It follows that, even assuming respondent's lawyer provided inadequate representation when he failed to raise a *Collins* objection at trial, and even assuming respondent's sentence would have been different if the objection had been made,[2] respondent neverthe-

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[2] It is by no means clear that, even if respondent had raised an objection to the use of pecuniary gain as an aggravating circumstance, the Arkansas courts would have agreed with the Eighth Circuit that the sentencing proceeding was therefore invalid. State courts are, of course, obligated to follow the Constitution, but they are not obligated to follow the decisions of lower federal courts in determining what the Constitution requires. See *Steffel* v. *Thompson*, 415 U.S. 452, 482

less suffered no violation of his Sixth Amendment rights. That is because counsel's asserted error did not deprive respondent of a fundamentally fair sentencing or of a constitutional right designed to ensure a fair sentencing. More than two years before the district court granted respondent's petition for habeas relief, this Court held in *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), that the Eighth Amendment's prohibition against cruel and unusual punishment does not prohibit a jury from imposing the death penalty on the basis of an aggravating circumstance that duplicates an element of the capital offense. Thus, under the law prevailing at the time respondent's habeas corpus petition was pending, the penalty phase of respondent's trial was valid under the Eighth Amendment.

That analysis finds support in the opinions in *Nix* v. *Whiteside*, 475 U.S. 157 (1986), and *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986). In *Nix*, this Court considered whether defense counsel's assistance was ineffective because counsel coerced the defendant to tell the truth by threatening to advise the court if his client testified falsely. The Court paraphrased the

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n.3 (1974) (Rehnquist, J., concurring); *United States ex rel. Lawrence* v. *Woods*, 432 F.2d 1072, 1075-1076 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971); *Owsley* v. *Peyton*, 352 F.2d 804, 805 (4th Cir. 1965); *Graham* v. *Scissor-Tail, Inc.*, 623 P.2d 165, 179 (Cal. 1981); *State* v. *Coleman*, 214 A.2d 393, 403-405 (N.J. 1965); *People* v. *Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991); 1B J. Moore, *Moore's Federal Practice* ¶ 402[1], at 23 (1992). The Arkansas Supreme Court therefore might well have disagreed with the Eighth Circuit on the validity of the Arkansas sentencing scheme, a judgment that would have been vindicated by later developments in this Court and in the Eighth Circuit.

Strickland prejudice requirement: "To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to 'undermine confidence in the outcome' of the trial." 475 U.S. at 165 (quoting *Strickland*, 466 U.S. at 694). The Court stated that, "as a matter of law," counsel's conduct could not "establish the prejudice required for relief under the second strand of the *Strickland* inquiry." The Court explained that "the 'benchmark' of an ineffective-assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'" 475 U.S. at 175 (quoting *Strickland*, 466 U.S. at 695). Even if Whiteside's lawyer effectively compelled him to abandon his intention to give perjured testimony in his own defense, the Court noted, Whiteside "has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." 475 U.S. at 175-176.

Justice Blackmun, in a concurring opinion for the four justices who did not join the majority opinion, agreed that no prejudice had been demonstrated under *Strickland*. By asserting that he would have been acquitted if he had been able to testify falsely, Whiteside "claims a right the law simply does not recognize," Justice Blackmun explained. "Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." 475 U.S. at 186-187.

Like Whiteside's claim, respondent's claim that his lawyer should have objected to the use of pecuniary gain as an aggravating circumstance is an assertion of "a right the law simply does not recognize." The Eighth Amendment confers no right on a defendant to prevent the jury from imposing the death penalty based on a factor that was also an element of the underlying offense. Since the procedures employed in the sentencing phase of respondent's trial were fully consistent with the Constitution, respondent was not entitled to have his sentence invalidated on collateral attack.

The opinion of the concurring justices in *Kimmelman* v. *Morrison*, *supra*, reiterates the same theme. In *Kimmelman*, the Court held that a claim that defense counsel was constitutionally ineffective in failing competently to litigate a Fourth Amendment issue could be raised on federal habeas corpus despite the limitation of *Stone* v. *Powell*, 428 U.S. 465, 482-496 (1976), on the use of the exclusionary rule in habeas corpus proceedings. The Court remanded the case because the record was "incomplete with respect to prejudice" under *Strickland*. 477 U.S. at 390. In an opinion concurring in the judgment, Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist, emphasized that the majority's resolution of the case had left unresolved the *Strickland* prejudice issue, and strongly suggested that prejudice within the meaning of *Strickland* could never result from counsel's failure to obtain the suppression of reliable evidence. Justice Powell wrote, 477 U.S. at 396, that "the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict." Therefore, "the harm suffered by respondent in this case is not the denial of a fair and reliable

adjudication of his guilt, but rather the absence of a windfall." As long as the fundamental fairness of the trial is not affected, Justice Powell noted, the harm suffered by the defendant "does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment." *Ibid.* Rather, "it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." 477 U.S. at 397.

From these articulations it is plain that, to show "prejudice," as that term is used in *Strickland*, respondent was required to demonstrate, at a minimum, that his counsel's conduct deprived him of a fundamentally fair sentencing proceeding. Because it is now clear that respondent's sentencing proceeding was fair and constitutionally valid, respondent cannot make that showing. As Judge Loken concluded in dissent below, the court of appeals' decision granted respondent a windfall that *Strickland* does not require. Pet. App. A17.

The implications of respondent's claim are striking. If respondent is entitled to relief because his attorney failed to raise a claim that might have prevailed, even though it lacked merit, relief would also have to be granted to a prisoner whose lawyer failed to make a frivolous suppression motion, if the defendant could show that the judge assigned to his case had granted such motions in other cases. Likewise, an attorney might be regarded as constitutionally ineffective if he failed to pursue improper (but effective) trial tactics, as long as the judge before whom the case was being tried would not be likely to sustain objections to such tactics. If effect on the outcome is the only test, then there is no end to the meritless, improper, and even

unethical steps that a defense lawyer would be constitutionally obligated to pursue. This Court has never endorsed such an extravagant Sixth Amendment doctrine. It should not do so now.

B. Federal Habeas Corpus Relief Is Not Available If The Prisoner Is Not Being Held In Violation Of The Requirements Of The Constitution As They Are Currently Understood

In addition to misapplying *Strickland*, the court of appeals misinterpreted the scope of federal habeas corpus relief. The habeas corpus statute, 28 U.S.C. 2254(a), provides that a writ of habeas corpus may issue to an applicant "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." By its terms, the statute refers to custody that violates the Constitution at the present, *i.e.*, custody that is unlawful as of the time the writ is to be granted. If it is clear that the procedures employed in obtaining the defendant's conviction and sentence were lawful, it does not matter that, under the law prevailing at the time of his trial and sentencing, the defendant might have been able to obtain relief. Thus, in the case of a claim of ineffective assistance of counsel, a defendant should not be entitled to release if he does not have a presently valid claim for relief.[3]

[3] A presently valid constitutional claim is only one of the prerequisites for obtaining relief on habeas corpus. This Court's recent habeas corpus decisions make it clear that a prisoner normally is not entitled to habeas relief unless his claim would also have been valid at the time of his trial or when his conviction became final. See *Teague* v. *Lane*, 489 U.S. 288, 308 (1989) (plurality opinion); *Penry* v. *Lynaugh*, 492 U.S. 302, 318 (1989); *Butler* v. *McKellar*, 494 U.S. 407, 413-414 (1990); *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990); *Sawyer* v. *Smith*, 110 S. Ct. 2822, 2830 (1990) ("[f]ederal habeas corpus serves to ensure that state convictions comport with the federal law that was established at the time the petitioner's conviction became final"). That separate limitation on the availability of habeas corpus relief is based on considerations of finality and proper respect for state court rulings on constitutional questions. Of course, the fact that it is ordinarily necessary to show that the claim was valid when the case was pending on direct review does not mean that all a habeas petitioner needs to show is that his claim would have been upheld under the standards prevailing at that time. If it has since become clear that the claim is not valid, the prisoner has failed to satisfy the first requirement for habeas relief—to show that he is currently being held in violation of the Constitution. Nor is there any force to the argument, see *Butler* v. *McKellar*, 494 U.S. at 422 n.4 (Brennan, J., dissenting), that it is somehow unfair to deny relief to a defendant who relies on a precedent that is no longer good law. The two prerequisites of habeas relief —the present validity of the prisoner's claim and the validity of the claim at the time of the trial—serve different purposes in habeas corpus law. The first is necessary to determine, as a threshold matter, whether anything that happened at the prisoner's trial raises constitutional concerns. The second is necessary to determine whether, once such concerns have been identified, considerations of comity and finality dictate that collateral relief should nonetheless be denied. If, under the current (and presumably the best) understanding of constitutional principles, there was no flaw in the trial, there is no reason even to reach the second question—whether the trial was conducted in accordance with constitutional standards applicable at the time the prisoner was tried. The fact that the prisoner must satisfy the second prerequisite does not somehow make it unfair to require him to satisfy the first.

In light of this analysis, the lower courts' focus on the state of the law at the time of respondent's trial is misplaced. See Pet. App. A5-A12, A27-A28. Contrary to the court of appeals' suggestion, it should not

matter to the resolution of this case whether the trial court would have, or should have, followed the rule in *Collins* if that decision had been brought to the court's attention. Likewise, it should not matter whether *Lowenfield* is viewed as having changed the law or merely as having applied prior legal principles in a somewhat different setting. All that matters is whether counsel's error resulted in the forfeiture of a right recognized at the time of the habeas proceeding. It is clear that under *Lowenfield*, which was decided while respondent's petition for habeas review was before the federal district court, counsel's conduct did not result in respondent's being sentenced in violation of the Eighth Amendment. Thus, the writ of habeas corpus should not have been granted.

To grant relief in a case such as this would invert the proper relationship between direct and collateral review. If respondent had objected to his sentencing proceeding and the state courts had upheld the Arkansas sentencing scheme, either in anticipation of *Lowenfield* or because *Lowenfield* had been decided while the case was on appeal, respondent would not have been able to argue in this Court that his sentence should be overturned because at the time of his trial the Eighth Circuit supported his position. Yet respondent now argues that his collateral attack should succeed where a direct appeal would have failed. His argument, reduced to its core, is that he should prevail because the Eighth Circuit agreed with his position at the time of his trial. That argument provides no justification for granting collateral relief.

II. EVEN IF THE DISTRICT COURT WAS CORRECT TO GRANT THE WRIT, THE STATE IS ENTITLED TO CONDUCT A NEW SENTENCING HEARING

Although the court of appeals upheld the district court's grant of respondent's habeas petition, it reversed the portion of the district court's order allowing the State to conduct a new sentencing proceeding. The court of appeals directed the district court to modify its order "to reduce unconditionally [respondent's] sentence to life imprisonment without parole." The court explained that to resentence respondent under current law "would perpetuate the prejudice caused by the original sixth amendment violation." Pet. App. A14.

This is clear error. Following a grant of habeas relief, it is ordinarily contemplated that the State may attempt to correct the defects identified by the habeas court by applying currently valid law. Thus, a State is permitted to retry or resentence a defendant under contemporary constitutional standards unless the original defect goes to the State's very ability to charge or try the defendant. See, *e.g.*, *Parker* v. *Dugger*, 111 S. Ct. 731, 740 (1991) (reversing and remanding to the district court for an order directing state court to "initiate appropriate proceedings * * * so that [the defendant's] death sentence may be reconsidered" in light of the Court's ruling); *Hitchcock* v. *Dugger*, 481 U.S. 393, 399 (1987) (reversing and remanding with instructions to grant a writ of habeas corpus unless the State resentences the defendant in accordance with its decision).[4] Accordingly, Arkansas would ordinarily be allowed to resentence a defendant, such as respondent, who has received ineffective assistance of counsel at the sentencing phase, as long as

the procedures employed at resentencing are constitutionally valid.

Under current law, it would be entirely proper for the jury to consider pecuniary gain as an aggravating circumstance in deciding whether to sentence respondent to death. Respondent's attorney would therefore no longer have any ground for objecting to the submission of that factor to the jury, and the jury could reimpose the death penalty on that basis. The court of appeals' decision to bar a resentencing proceeding has the bizarre effect of preventing the State from correcting its "errors," as identified by the federal court on habeas review. That remarkable result is premised on the theory that if the State simply follows the procedural rule that it applied in the first place, respondent will be no better off and thus will not have been afforded an adequate "remedy" for the violation of his Sixth Amendment rights. The fact that a remedial order permitting the State to resentence respondent does not require any change in the original procedure does not show that such an order would fail to remedy respondent's "prejudice." Rather, it simply confirms that respondent suffered no prejudice in the first place.

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[4] This case raises no issue under the Ex Post Facto Clause, see *Dobbert* v. *Florida*, 432 U.S. 282 (1977). That Clause applies only to statutes, not to rulings of courts addressing the scope of constitutional rights. Under Arkansas sentencing procedures, pecuniary gain was a permissible aggravating circumstance at the time respondent committed his offense, and it is still a permissible aggravating circumstance today. The fact that for a period following respondent's crime the Eighth Circuit took the view that pecuniary gain could not be used as an aggravating circumstance in a case such as respondent's does not give rise to Ex Post Facto concerns.

This Court's decision in *United States* v. *Morrison*, *supra*, is instructive here. In that case, the court of appeals found that the government had engaged in improper conduct designed to deprive the defendant of her right to counsel. This Court reversed, holding that absent some injury of a constitutional dimension, it was improper for the court of appeals to order relief. As this Court explained, "[t]here is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals." 449 U.S. at 366-367. Because respondent in this case, like the defendant in *Morrison*, suffered no cognizable prejudice, he should not be entitled to any relief, much less the extraordinary relief of forbidding the State to resentence him.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

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No. 91-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. L. LOCKHART, Director,
Arkansas Department of Corrections,

Petitioner,

vs.

BOBBY RAY FRETWELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

QUESTION PRESENTED

Is a state defendant "prejudiced," within the meaning of *Strickland* v. *Washington*, by his attorney's failure to make an objection based on a federal circuit precedent which (1) was wrongly decided, (2) was never accepted in or binding on the state courts, and (3) has since been overruled?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the contention that the failure of trial counsel in an Arkansas court to raise a claim based upon Eighth Circuit precedent constituted ineffective assistance of counsel, in spite of the fact that the Eighth Circuit precedent had subsequently been

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1. CJLF has received written consent from both parties to file this brief.

overruled. This ruling, if affirmed, would permanently exempt a convicted murderer from full punishment, even though he is guilty of a capital offense and a properly instructed jury has found the death penalty to be an appropriate punishment. Such an injustice is contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in the case.

SUMMARY OF FACTS AND CASE

Petitioner entered the home of Sherman Sullins and robbed him of his money at gunpoint. He then struck Mr. Sullins on the head with his gun. When this failed to kill Sullins, petitioner placed the barrel of his gun to Sullins' temple and shot and killed him. Petition for Writ of Certiorari ("Pet. Cert.") Appendix A-22 (District Court memorandum opinion).

Petitioner was convicted of murdering Sullins in the course of a robbery. At the sentencing phase, the court instructed the jury on two aggravating circumstances: that the crime was committed for the purpose of avoiding arrest and that it was committed for the purpose of pecuniary gain. Trial counsel failed to object to the pecuniary gain instruction. Six months earlier the Eighth Circuit had held that it was unconstitutional to use pecuniary gain as an aggravating circumstance in robbery-murder cases. Pet. Cert. 4-5.

Petitioner's conviction and death sentence were affirmed by the Arkansas Supreme Court. *Fretwell* v. *State*, 289 Ark. 91, 708 S. W. 2d 630 (1986). The Eighth Circuit granted habeas relief. It found that trial counsel's failure to attack the pecuniary gain instruction based on the prior Eighth Circuit precedent was ineffective assistance of counsel in spite of the fact that this Eighth Circuit precedent had been effectively overruled by the Supreme Court after petitioner's trial. See *Fretwell* v. *Lockhart*, 946 F. 2d 571 (CA8 1991). The Eighth Circuit

also ordered the District Court "to reduce unconditionally Fretwell's sentence to life imprisonment without parole." *Id.*, at 578.[2]

SUMMARY OF ARGUMENT

Collins v. *Lockhart*, 754 F. 2d 258 (CA8 1985) was never the law in Arkansas state courts. The precedents of the lower federal courts are not binding on state courts. Therefore, it is incorrect to presume that Arkansas courts would have been obligated to uphold a *Collins* objection had it been made.

Ineffective assistance of counsel claims should be strictly limited to their purpose. These claims penalize the state even when it does nothing wrong. The person responsible for the wrong, defense counsel, is the traditional opponent of the state over whom it may exert little if any control.

There is also a real danger of spurious ineffective assistance claims. The institutional constraints that limit unfounded malpractice claims in civil cases are largely absent from ineffective assistance attacks. This is particularly true in capital cases, where nearly every capital conviction spawns an ineffective assistance claim.

The prejudice requirement for ineffective assistance should be limited to errors undermining confidence in the result of the trial. Both the right to counsel and the subsidiary right to effective assistance of counsel are grounded in the notion that defense counsel is needed to insure the reliability and justice of criminal trials. There is no right to an improper acquittal.

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2. The court's authority to issue this order is highly doubtful. See *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961). It is unclear whether the state has sought review of this holding. See Pet. Cert. 6-7, 17. That issue need not be addressed, since the predicate Sixth Amendment holding is clearly erroneous.

Failure to raise an incorrect decision by the Eighth Circuit did not prejudice Fretwell's trial. Just as there is no right to a lawless factfinder under *Strickland*, so there is no right to an erroneous decision of law. Just as there is no right to false evidence under *Nix* v. *Whiteside*, so there is no right to false law.

Fretwell has lost nothing to which he was entitled. He has suffered no legally cognizable prejudice.

ARGUMENT

I. *Collins* was never the law in Arkansas state courts.

In addressing the prejudice component of Fretwell's claim, the Eighth Circuit committed a breathtaking error regarding the relations between federal and state courts. The court held that "since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins*[3] had Fretwell's attorney made one." *Fretwell* v. *Lockhart*, 946 F. 2d 571, 577 (CA8 1991). The court then goes on to hold that *Collins* was "good law" at the time of Fretwell's trial in *state* court and that he was therefore "*entitled* to its benefits." *Id.*, at 578 (emphasis added).

It is evident from these statements that the Eighth Circuit believes that its precedents are binding on state courts within the circuit to the same extent as they are binding on federal district courts. The contrary rule is almost universally recognized by courts and commentators, although there does not appear to be any direct statement by this Court on the precise point. Clarifying the status of circuit precedents, i.e. whether they are binding or merely persuasive, is necessary for the daily operation of state

3. *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985), overruled in *Perry* v. *Lockhart*, 871 F. 2d 1384, 1393 (CA8 1989).

courts where these precedents are routinely cited. Therefore, *amicus* respectfully requests that the Court make a clear statement of the law on this point.

The doctrine of *stare decisis* has "spawned a vast literature." 1B J. Moore, *Moore's Federal Practice* ¶ 402[1], at 5, n. 1 (1992) (cited below as "Moore"). Most of that literature, however, deals with the question of when courts should adhere to their own precedents and when they should overrule them. See, *e.g.*, Traynor, *Limits of Judicial Creativity*, 29 Hastings L. J. 1025 (1978).

Precedents established by other courts have received far less attention, no doubt because the rules are quite simple. A precedent established by a "higher" court is mandatory. Only the court of last resort can overrule its own precedent, and until it does that precedent is binding on all lower courts. See, *e.g.*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983). On the other hand, it is equally well established that the decision of a coordinate court is not binding precedent. See Moore, *supra*, at 14-18: H. Black, *Law of Judicial Precedents* 117 (1912). Thus, a decision of one federal circuit is not binding on another circuit as *stare decisis* when the same question of law is presented in a different case. *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 488 (1900).[4]

The question of what is a "higher" court for this purpose is one that rarely arises. One would think that the point is so well settled that no discussion is necessary, but the Eighth Circuit's statements in this case make discussion necessary. According to Professor Moore, courts are obligated to follow the precedents established by courts to which they "owe obedience," see Moore,

4. Prior adjudication by a coordinate court in the *same* case is entirely different. See *Christianson* v. *Colt Industries*, 486 U. S. 800, 816 (1988) (law of the case); Moore, *supra*, ¶ 0.401, at 3-5 (distinguishing *stare decisis* from *res judicata* and related doctrines).

supra, at 12, but this is merely a way of stating the conclusion. The rule seems to be that one court owes obedience to another where the latter has jurisdiction to reverse the judgment of the former directly and not collaterally.

The power to entertain a collateral attack on a judgment does not render a court's decisions binding precedent on the court which entered the judgment. In *Price* v. *Johnston*, 334 U. S. 266, 269-270, 286 (1948), for example, a federal district court in California had the power to entertain a collateral attack on a judgment of a federal district court in Michigan, and was reversed for not doing so. All of the district courts had the power to entertain such attacks on each other's judgments at the time.[5] Yet this power did not make every district's precedents binding in every other district.

The Court of Appeals in the present case asserted the Supremacy Clause as the basis of its claim to make binding precedent for Arkansas courts. 946 F. 2d, at 577. This is a red herring. A state court which declines to follow circuit precedent is not asserting state law over federal law; it is merely disagreeing over what the federal law actually is. That question is not settled until the court of last resort has spoken. See *Posados* v. *Warner, Barnes & Co.*, 279 U. S. 340, 345 (1929).

The Supremacy Clause does make a federal court's order prevail over a state court's order when both courts happen to have jurisdiction of the same subject matter. Thus in *Ableman* v. *Booth*, 62 U. S. 506, 523 (1859), a state court was not permitted to issue habeas corpus to free a federal prisoner, while federal courts do have the power to free state prisoners, 28 U. S. C. § 2254. As noted earlier, however, this *collateral* review power does not render one court's decisions mandatory precedent in another court.

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5. This was before the enactment of 28 U. S. C. § 2255.

Perhaps the clearest statement of the rule is that given by Professor Moore:

> "In matters of federal law, of course, all the state courts owe obedience to the decisions of the Supreme Court of the United States [footnote omitted], but the decisions of the courts of appeals in the circuit embracing the state, or those of the district court of the district in which the trial takes place do not govern under the doctrine of stare decisis.[40]

"[40] In cases in which federal law is applied, and the jurisdiction in federal and state courts is concurrent, the state court must follow the federal law, and the decisions of the inferior federal court are, naturally, persuasive authority on issues as yet unresolved by the Supreme Court. In such cases, however, the state courts owe no special obedience to the decisions of the particular circuit in which the state is located, or in the strict sense, to the decisions of the federal inferior courts as a class, and any error they may make in their interpretation of the federal law must be corrected by the Supreme Court. See Amalgamated Clothing Workers of America v. Richman Brothers (1955) 348 U. S. 511, 75 S. Ct. 452, 99 L. Ed. 600." 1B Moore, *supra*, at 23.

This rule has been established for a long time. It was hornbook law 80 years ago. Black, *supra*, at 372; see also 9 B. Witkin, *California Procedure* § 780, at 751 (3d ed. 1985). It is also the rule followed by the majority of state courts. See, *e.g.*, *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N. J. 69, 577 A. 2d 1239, 1244-1245 (1990); *People* v. *Del Veccio*, 129 Ill. 2d 263, 544 N. E. 2d 312, 327 (1989); *State* v. *Barefield*, 110 Wash. 2d 728, 756 P. 2d 731, 733, n. 2 (1988); *South Salina Street, Inc.* v. *Syracuse*, 68 N. Y. 2d 474, 503 N. E. 2d 63, 70-71 (1986); *State* v. *Moyle*, 299 Or.

691, 705 P. 2d 740, 750 (1985); *Head* v. *State*, 253 Ga. 429, 322 S. E. 2d 228, 231 (1984); *Commonwealth* v. *Montanez*, 388 Mass. 603, 447 N. E. 2d 660, 661-662 (1983); *State* v. *Dwyer*, 332 So. 2d 333, 335 (Fla. 1976); *People* v. *Bradley*, 1 Cal. 3d 80, 86, 460 P. 2d 129, 132 (1969).

The rules and practice of this Court further confirm that state courts have the power and the duty to make independent judgments of federal law and not mechanically follow the circuits. Rule 10.1 lists some of the reasons guiding this Court's decision on whether to grant certiorari, including the following (emphasis added):

> "(a) *When a United States court of appeals* has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or *has decided a federal question in a way in conflict with a state court of last resort*; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> "(b) *When a state court of last resort has decided a federal question in a way that conflicts with* the decision of another state court of last resort or of *a United States court of appeals*."

If state courts were bound by the Supremacy Clause to follow the lower federal courts, the italicized portions of this rule would not be needed. A federal decision conflicting with a state decision would be controlling, the state decision would no longer be good law, and there would be no need for this Court to resolve the conflict. Conversely, a state court refusal to follow federal circuit precedent would not require hearing the case on the merits, but only summary reversal with instruction to follow binding precedent.

The rule reads the way it does precisely because circuit precedent is *not* binding on the states. When a conflict arises, this Court grants certiorari to resolve the conflict,

exactly the same as it would if two federal circuits were in conflict. See, *e.g.*, *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 524, 110 S. Ct. 3047, 3054 (1990). In such cases, it is not unusual for this Court to decide that the state court was correct. See, *e.g.*, *ibid*.

The Arkansas Supreme Court evidently takes the view that it is not bound to follow the Eighth Circuit. In *Hendrickson* v. *State*, 285 Ark. 462, 688 S. W. 2d 295, 297 (1985), for example, the state court refused to follow *Grigsby* v. *Mabry*, 758 F. 2d 226 (CA8 1985). The Arkansas Supreme Court was entirely correct in taking this position. *Grigsby* was later reversed in a companion case, *Lockhart* v. *McCree*, 476 U. S. 162, 165 (1986).

At the time of Fretwell's trial, *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985) was binding precedent *only* in the federal courts of the Eighth Circuit. Arkansas state courts were no more obligated to follow it than were the other federal circuits. The Eighth Circuit's conclusion that Fretwell *necessarily* would have been sentenced to life in prison if his lawyer had made a *Collins* objection is therefore wrong. Even more important, however, is the question of whether this possible loss of a wrongful escape from a deserved punishment is "prejudice" justifying the overturning of a final judgment.

II. Ineffective assistance of counsel claims should be strictly limited to their purpose.

A. Unique Nature.

Claims of ineffective assistance of counsel are unique to constitutional criminal procedure. Every other constitutional error is the consequence of some state wrongdoing, such as passing a vague law, see *Connally* v. *General Constr. Co.*, 269 U. S. 385 (1926); coercing a confession, see *Brown* v. *Mississippi*, 297 U. S. 278 (1936); giving improper jury instructions, see *In re Winship*, 397 U. S. 358 (1970); or withholding exculpatory evidence, see *Brady*

v. *Maryland*, 373 U. S. 83 (1963). For an ineffective assistance of counsel claim, however, a state does nothing wrong but still sees its conviction overturned.

The passive role the state must play regarding ineffective assistance of counsel places a duty on the courts to strictly limit this claim to its core purpose, assuring that counsel's representation does not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). If ineffective assistance claims are not strictly limited, then the integrity of the criminal justice system will be threatened as the state is forced to defend its convictions against conduct over which it has neither responsibility nor control.

1. State action.

With one exception[6] the federal Constitution may be invoked only to prohibit state action. See J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 12.1, at 421 (3d ed. 1986). In the typical constitutional case, the state action question is not controversial, with state action being readily apparent. See *ibid*. In those cases where it is at issue, where someone attempts to attribute the actions of an individual to the state, caution is prudent.

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our

6. See U. S. Const. amend. XIII.

> political order." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936-937 (1982) (emphasis added).

Thus state action will be found only where an individual's actions can "be *fairly* attributable to the State." *Id*., at 937 (emphasis added). In the standard criminal case this is a given. There are no more evident state actors than police, prosecutors, judges, or legislatures, the sources of most constitutional conflict in criminal law. Ineffective assistance of counsel, however, is different. Of all the claims made by a criminal defendant this one is the most difficult to attribute to the state because the culprit, the incompetent attorney, is immune from state supervision. Defense counsel is, if anything, an opponent of the state.

2. Defense counsel and the state.

Defense counsel is the paid opponent of the state. "The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to law." ABA, Standards for Criminal Justice, Standard 4-1.1(b) (2d ed. 1986). If counsel is privately employed, the state can exert no more influence over him than it can over any other private attorney.

> "[T]he clearly articulated judicial view is that the American criminal defense lawyer plays a vital role in the administration of justice. A lawyer functioning in that role owes loyalty to his or her client alone." C. Wolfram, *Modern Legal Ethics* § 10.5, at 588-589 (1986) (footnote omitted).

In *Polk County* v. *Dodson*, 454 U. S. 312 (1981), this duty of loyalty was central to the holding that a public defender's representation of a client did not come within color of state law. Although public defenders were employees of the state, this did not alter the traditional attorney-client relationship. " 'Once a lawyer has under-

taken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" *Id.*, at 318 (quoting ABA, Standards for Criminal Justice, Standard 4-3.9 (2d ed. 1986)).

The fact that defense counsel is considered an officer of the court did not change the analysis. Our adversarial system requires defense counsel to oppose the state.

> "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.' " *Id.*, at 318-319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)).

Any effort by the state to control the public defender's representation of the accused runs into the Sixth Amendment's guarantee of counsel. "Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.*, at 322.[7]

When a conviction is reversed due to ineffective assistance of counsel, the state is being penalized even though it did nothing wrong. Not only is the state an innocent bystander, it is also difficult for the state to spot incompetence until it is too late. "Many aspects of [defense] counsel's performance either occur outside the trial court's notice or reasonably appear to be, though they are not in fact, competent. Thus, the existence of incompetence does not necessarily imply fault on the part of the state." Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. Chi. L. Rev. 1380, 1397 (1983).

7. The precedential value of *Polk County* is not diminished by *Georgia* v. *McCollum*, 60 U.S.L.W. 4574 (June 18, 1992). That case deals with the unique circumstance of defense counsel using a state-granted power to discriminate against a third person in the selection of a governmental body. *Id.*, at 4577-4578.

A successful ineffective assistance of counsel claim penalizes the state for an act over which it has neither control nor responsibility. Thus, the state acts as an insurer against a criminal defendant's risk of incompetent counsel, spreading the risk from defendants to the people through reversed convictions.

But criminal convictions are not accidents to be insured against, and the Sixth Amendment is not an insurance policy. While it may make sense to reverse convictions for some of counsel's errors, the state cannot be required to assure an ideal trial. Ineffective assistance claims already place a burden on the fairness of the criminal justice system. If counsel's error does not undermine confidence in the verdict, then that error should not be a ground for reversal. Review of counsel's performance should not be a tool to free the guilty, but an assurance of the fundamental justice of our legal system.

B. Crying Wolf.

Every litigation involves at least one winner and one loser. An unfortunate side effect of this fact is the all too human tendency of a losing litigant to place responsibility for the defeat on his attorney. See R. Mann & F. Smith, *Legal Malpractice* § 1.1, at 7 (3d ed. 1989). This leads to the risk of spurious malpractice claims. In civil law there is some protection from these claims. The standard method for an aggrieved client to remedy his attorney's civil malpractice is through a civil suit against the ineffective counsel. While many losing litigants may feel that their attorneys were substandard, the civil litigation process will screen out most spurious claims.

In addition to being ethically bound not to pursue meritless actions, see C. Wolfram, *Modern Legal Ethics* §

11.2.2, at 595 (1986), an attorney has substantial economic incentive not to file a meritless malpractice action. Many plaintiffs' attorneys are paid through contingency fees. See *id.*, § 9.4.1, at 526. An attorney paid on a contingency basis will not accept employment to prosecute a malpractice claim unless success is at least feasible. See *id.*, at 528. Even if an attorney is paid in some other way, there is ample incentive to take only feasible malpractice claims. An unsuccessful malpractice claim can itself be the basis of a subsequent malpractice claim. *Id.*, § 5.6.1., at 207, n. 38. Finally, the aggrieved client, if sufficiently rational, is likely to pay heed to warnings that a malpractice claim is not feasible and drop the action. Litigation is an unpleasant and expensive experience and few will voluntarily undergo it if success is unlikely.

These institutional constraints are largely missing from ineffective assistance of counsel attacks. A convicted criminal who cannot afford appellate counsel is entitled to appointed counsel for his first appeal as of right. *Douglas* v. *California*, 372 U. S. 353, 357 (1963). While no such constitutional right exists for habeas corpus, *Murray* v. *Giarratano*, 492 U. S. 1 (1989), Congress has provided funding for habeas corpus counsel for death row inmates. 21 U. S. C. § 848(q)(4)(B).

As there is little if any economic disincentive on a convicted criminal's ability to make a challenge to his conviction, criminal defense attorneys are particularly prone to allegations of incompetence through ineffective assistance of counsel claims. This is especially true in death penalty litigation. Death row inmates have a particularly keen interest in seeing their convictions overturned and have free access to attorneys to pursue federal habeas corpus claims. These problems are aggravated by the existence of a body of opponents to the death penalty who will do virtually anything to prevent executions. See, *e.g.*, *Gomez* v. *U. S. District Court*, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992). This can only create a hothouse

environment for ineffective assistance of counsel claims in capital cases.

This climate is supplemented by the complexity of death penalty law. Few areas of the law are as complicated as the death penalty. The frailties of human nature make mistakes by defense counsel inevitable in such a climate. Yet no one is entitled to a perfect defense.

> "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—*even if defense counsel may have made demonstrable errors*—the kind of testing envisioned by the Sixth Amendment has occurred." *United States* v. *Cronic*, 466 U. S. 648, 656 (1984) (emphasis added) (footnotes omitted).

Yet in capital litigation, convicted defendants are attempting to make perfection the standard of competence in order to thwart execution of their sentence. Thus in one habeas attack on a capital conviction

> "In support of this contention, [that counsel was ineffective] an experienced capital defense attorney testified in appellant's behalf that effective assistance of counsel in a capital case *requires raising and preserving every colorable claim at trial and on appeal.* Thus according to this attorney, the failure of appellant's counsel to raise and preserve all colorable claims constituted ineffective assistance of counsel." *Lindsey* v. *Smith*, 820 F. 2d 1137, 1144 (CA11 1987) (emphasis added).

This Court has, of course, held expressly to the contrary, *Smith* v. *Murray*, 477 U. S. 527, 536 (1986), but the attitude persists.

Thus in capital cases, ineffective assistance of counsel claims have become the rule rather than the exception. In a study of federal habeas corpus, K. Scheidegger, *Rethink-*

ing Habeas Corpus (1989), reprinted in *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 212 (1991), *amicus* developed a list of capital habeas cases decided by the Eleventh Circuit between 1986 and 1989. The study examined decisions involving 70 different litigants seeking habeas relief from their death sentences. The cases are listed in the Appendix.

At least[8] 56 of the 70 petitioners made ineffective assistance counsel claims at some point on federal habeas corpus. Of these 56 claimants, 7 were successful in the Eleventh Circuit with their ineffective assistance claims, 44 had their claims rejected, and another 5 did not have a final decision on their claims. Thus, at least four-fifths of the capital petitioners made ineffectiveness claims, and only one-eighth of the claims were found to have merit.

One problem with this flood of meritless claims is that it delays the execution of judgment in capital cases. Habeas claims, even if spurious, require time to resolve. This is particularly true of ineffective assistance claims, which usually involve extensive discovery outside the trial record and can involve long habeas hearings at the district court level. Such meritless delay withers respect for the criminal justice system. See *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1466 (1991).

An equally disturbing effect is the possible erosion of the quality of counsel in capital cases. Defending someone accused of capital murder is not an easy task. The cases are complex, failure is frequent, the pay is not lucrative, and clients are almost always reprehensible. Yet, as the Eleventh Circuit's experience demonstrates, the vast majority of capital defendants receive adequate representation. If, however, even adequate representation

8. We say "at least" because some may have made the claims in unreported decisions.

will bring about a claim of ineffective assistance of counsel, then many attorneys who would otherwise take capital cases may withdraw from the field. "[T]he raising of such unfounded charges [of ineffective assistance] must have a significant 'chilling effect' on the willingness of experienced attorneys . . . to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of counsel in light of this fact." *Blake* v. *Zant*, 513 F. Supp. 772, 802, n. 13 (S.D. Ga. 1981); accord *Strickland*, *supra*, 466 U. S., at 690.

Finally, the barrage of meritless claims endangers the relatively few worthy ineffective assistance claims. "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen* 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the result).

Ineffective assistance litigation is a heavy burden on the criminal justice system. This burden is a necessary evil where the reliability of the result is in grave doubt. It becomes less necessary and more evil as the question moves farther away from reliability. Despite the Court's contrary intent, *Strickland* did "encourage the proliferation of ineffectiveness challenges." 466 U. S., at 690. To place some limits on this proliferation, the prejudice component of *Strickland* needs to be precisely and narrowly defined.

III. The *Nix* v. *Whiteside* concurrence's concept of "legally cognizable prejudice" should be adopted.

A. Basis of the Doctrine: Powell to Strickland.

From the very beginning, the right to effective assistance of counsel has been based on the unreliability of trial without counsel. A lay defendant

> "lacks both the skill and knowledge adequately to prepare his defense, *even though he have a perfect one.* He requires the guiding hand of counsel at

> every step in the proceedings against him. Without it, *though he be not guilty*, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932) (emphasis added).

In *Powell*, counsel were not appointed until the morning of the trial. *Id.*, at 56. Under the circumstances, this was a denial of due process of law, because the timing of the appointment "preclude[d] the giving of effective aid in the preparation and trial of the case." *Id.*, at 71. The Court's discussion of the circumstances of the case implies a well-founded concern as to whether the defendants were actually guilty. *Id.*, at 50-52.

A precursor of the *Strickland* prejudice requirement can be seen in *Avery* v. *Alabama*, 308 U. S. 444 (1940). In *Avery*, counsel were appointed three days before trial. *Id.*, at 447. In affirming, the Court noted "the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." *Id.*, at 452; cf. *Strickland* v. *Washington*, 466 U. S. 668, 699-700 (1984).

The most explicit statement about a real possibility of innocence came in *Glasser* v. *United States*, 315 U. S. 60, 67 (1942):

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

In announcing the prejudice element of an ineffective assistance claim, *Strickland* brought to the surface and made explicit what had been an implicit undercurrent in *Powell*, *Avery*, and *Glasser*. Because the right to effective

assistance is a component of a right to a fair trial, ineffective assistance is a ground for reversal only when it renders the trial unfair. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*." *Strickland* v. *Washington*, *supra*, 466 U. S., at 687 (emphasis added).

Washington's claim was that certain evidence had been omitted from the penalty phase of his trial. *Id.*, at 700. With this evidentiary issue in mind, the Court explained its "reliable result" principle by borrowing a standard from other rules dealing with omitted evidence. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.*, at 694 (citing *United States* v. *Agurs*, 427 U. S. 97, 104 (1976) (information not disclosed by prosecution); *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 872-874 (1982) (deported witness)).

The *Strickland* Court made clear, however, that this test was a guide and not a mechanical rule. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged . . . ." *Id.*, at 696. The keys are reliability and confidence that the result is just. See *ibid*. In a different context, the evidence-oriented test of reasonable probability of a different result may not be the appropriate one for implementing the underlying principle.

B. Perjury and Prejudice.

A radically different context was not long in coming. The testimony that Washington claimed should have been presented was presumably truthful, if weak. Emanuel Whiteside had an entirely different strategy in mind. He wanted to lie. *Nix* v. *Whiteside*, 475 U. S. 157, 161 (1986). His attorney refused to let him. *Ibid*. The Eighth Circuit held that this was ineffective assistance. *Id.*, at 163.

The *Nix* majority devotes most of the opinion to the performance component of the *Strickland* test, and its discussion of the prejudice prong is consequently brief. "Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." *Id.*, at 175-176. Unfortunately, instead of explaining *why* a reasonable probability of a different result is insufficient to establish prejudice in this context, the majority proceeds directly to distinguishing the cases of presumed prejudice, for which no showing is required. *Id.*, at 176.

Justice Blackmun's concurring opinion is more helpful. By denying the claim solely on the prejudice ground, the concurrence effectively holds that Whiteside had no claim, even if his lawyer's conduct fell below Sixth Amendment minimums. To reach this result, the concurrence returns to the underlying principle of the *Strickland* prejudice component. "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something 'to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Id.*, at 184 (quoting *Strickland*). Since withholding false evidence does not detract from reliability, Whiteside had no claim. *Id.*, at 185. This is true, Justice Blackmun makes quite clear, *even if* the false evidence might have changed the result. *Id.*, at 186.

Thus, it is not a universal rule that any error which had a reasonable probability of changing the result satisfies the prejudice prong. The Court unanimously rejected Whiteside's prejudice claim even assuming the result would have been different. *Id.*, at 175-176 (majority); *id.* at 186-187 (concurrence). *Strickland* laid down the different-outcome test in the context of the facts of that case, but the test should not be applied where it does not implement the underlying principle of reliability.

C. Kimmelman v. Morrison.

The decision in *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986) must be read carefully in light of the facts, issues, and arguments before the Court in that case. Morrison's trial counsel had failed to timely move for the exclusion of evidence on the ground it had been illegally seized. *Id.*, at 368-369. When the federal courts granted habeas relief for ineffective assistance, the state attorney general petitioned for certiorari. The state asked that *Stone* v. *Powell*, 428 U. S. 465 (1976) be extended to ineffective assistance claims where the underlying error is based on the exclusionary rule. 477 U. S., at 368; see also *id.*, at 397, n. 4 (Powell, J., concurring in the judgment).

Stone is a case establishing an exception to the rule of *de novo* review of federal constitutional claims on habeas corpus. *Stone*, 428 U. S., at 481-482. It has no effect on the manner in which state courts should review such claims on direct appeal. What the state sought in *Kimmelman* was an exception to the holding of *Strickland* that the legal issues in ineffective assistance claims would be reviewed *de novo* on habeas. See *Strickland*, 466 U. S., at 697-698. The Court unanimously rejected this request. *Kimmelman*, 477 U. S., at 382-383 (majority); *id.*, at 391 (concurrence). An ineffective assistance claim based on failure to move for suppression of evidence is thus reviewed on habeas exactly the same as it is on direct review.

The discussion of prejudice in *Nix*, *supra*, raises another question, however. That question was not argued in *Kimmelman*. "The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case." *Id.*, at 391 (Powell, J., concurring in the judgment).

Justice Powell's concerns were apparently prompted by the majority's statement that "[w]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Id.*, at 380. The first part of this statement is a pure example of the straw man fallacy. Neither the state nor the concurrence contended that the right was conditioned on actual innocence. The second part confounds the scope of the right with the question of when an error is ground for reversal. The prejudice component of *Strickland* is addressed only to the latter. The majority then goes on to acknowledge the limited issue before the Court and the true holding of the case: ineffective assistance in the litigation of a Fourth Amendment claim is judged the same on habeas as on direct review. *Ibid*. The question raised by the concurring opinion is still open.

Even if the majority's broad language is considered authoritative, however, that language is contrary to the Eighth Circuit's holding in the present case. The majority states unequivocally that a meritorious issue is "necessary to the success of a Sixth Amendment claim like respondent's . . . ." *Id.*, at 382. The need to establish the merits of the claim is clear from the Court's decision to remand. The State was entitled to show that the search was legal. *Id.*, at 390-391. This entitlement is not phrased in terms of a probability that the state would have prevailed on the issue at trial. If the search was legal, there was no prejudice.

D. Right to Assistance v. Right to Reversal.

There is no question that a defendant is entitled to the "guiding hand of counsel at every step of the proceedings . . . ." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). The question on the prejudice component of *Strickland* is

whether an error or assumed error[9] is ground for reversal. The prejudice discussions in *Strickland*, *Kimmelman*, and *Nix* must be read together in the context of the facts of each case.

In *Strickland* there was no question that omitted evidence was relevant and admissible. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987) (all evidence proffered as mitigating must be considered). Therefore the only issue regarding reliability of the result was whether that evidence would have made a difference. See *Strickland*, 466 U. S., at 694.

In *Kimmelman*, the admissibility of the evidence was hotly disputed, though its veracity and relevance were not. *Kimmelman* therefore added to *Strickland's* "reasonable probability" requirement a condition that admitted evidence actually be inadmissible. *Kimmelman*, 477 U. S., 382, 390-391. To those who still believe in the exclusionary rule, a conviction on illegally obtained evidence is a "wrong" result. See, *e.g.*, 1 W. LaFave, *Search and Seizure* § 1.1(f), at 17 (2d ed. 1987). Even those who disagree with the rule must concede that the result is contrary to what the law would require if the controversy had been fully aired and correctly decided. Failure to object to illegally seized evidence, therefore, arguably qualifies for the basic definition of prejudice: "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U. S., at 696.

The evidence in *Nix* lies at the opposite end of the spectrum from the evidence in *Strickland*. Lying under oath is not merely an error, it is a felony. Unlike the exclusionary rule, where the justice of the result is debatable, no one could contend that a trial where a defendant

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9. If the court addresses the prejudice component first, see *Strickland*, 466 U. S., at 697, it may never reach the question of whether an unprofessional error was actually committed.

is restrained from lying is thereby rendered less reliable or less likely to produce a just result. See *Nix*, *supra*, 475 U. S., at 185 (Blackmun, J., concurring in the result). Where introducing evidence would be wrong, omitting that evidence cannot be prejudicial, regardless of whether it might have changed the result.

There are many cases where defense lawyers have obtained wrong verdicts for their clients. See *id*., at 186. *Strickland* makes clear that defense counsel's failure to obtain a wrongful acquittal is not reversible error, even if a better lawyer might have obtained one. A failure to make a pitch for jury nullification is not prejudice, for example, even if a competent lawyer would have made one, and even if it would have worked. See *Strickland*, 466 U. S., at 694-695.

The question is not whether the defendant was deprived of a "sporting chance." See *Brady* v. *Maryland*, 373 U. S. 83, 90 (1963). It is only whether there is reason to lack confidence in the result. *Strickland*, 466 U. S., at 691-692. The scope of reversible error is therefore narrower than the scope of the defendant's right to effective assistance. Even where an effective lawyer could have "gotten him off" by causing the system to malfunction in some way, defendant is not entitled to a reversal.

E. Legally Cognizable Prejudice.

The answer to the riddle, *amicus* submits, lies in the *Nix* concurrence's concept of "legally cognizable prejudice." See *Nix* v. *Whiteside*, 475 U. S. 157, 184 (1986) (Blackmun, J., concurring in the result). It is not enough that the attorney's error might have changed the result. If the alleged error involves a claim of "a right the law

simply does not recognize," then it cannot form the basis of a valid claim.[10] *Id*., at 186.

The law does not recognize a right to a lawless decision maker. *Ibid*. (quoting *Strickland*, 466 U. S., at 695). The law does not recognize a right to present perjured testimony. *Ibid*. The law does not recognize a right to erroneous rulings from the trial court.

Legal doctrines change, of course, and a trial court ruling which was perfectly "correct," in the sense of obedience to precedent, may nonetheless be reversed as "error" if the precedent is overruled. In applying the performance component of *Strickland*, a court must look at the law at the time of the alleged error or omission. See *Strickland*, 466 U. S., at 690. It does not follow, however, that the question of whether any prejudice is legally cognizable should be governed by overruled law.

The "retroactivity" aspect of this problem need not be resolved in the present case, however. For the reasons set forth in part I, *ante*, at 4-9, *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985) was never the law in Arkansas state courts. Indeed, in its consideration of Fretwell's case, the Arkansas Supreme Court explicitly referred to the *Collins* argument as an attempt "to change the law." *Fretwell* v. *State*, 289 Ark. 91, 708 S. W. 2d 630, 634 (1986).

Fretwell, therefore, did not lose any right which the law presently recognizes or which the law in Arkansas state courts has ever recognized. The Arkansas Supreme Court has told us quite plainly that no such right was recognized at the time of the trial and appeal, and this Court's decision in *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) settles authoritatively that there is no such right.

---

10. Whether exclusion of illegally seized evidence is a "right" or a "windfall," see *Kimmelman* v. *Morrison*, 477 U. S. 365, 396 (1986) (Powell, J. concurring in the result), is a question which can and should await a case where it is both presented by the facts and argued in the briefs.

For the purpose of defining legally cognizable prejudice, false law is no different from false evidence. It is possible that the people might have been cheated out of justice, in a judgment from which they could not appeal. That possibility does not constitute legally cognizable prejudice. *Nix* v. *Whiteside*, *supra*, 475 U. S., at 186 (Blackmun, J., concurring in the judgment). The objection Fretwell's lawyer failed to make was, in reality, without merit. He has lost nothing to which he was entitled.[11] "Since [Fretwell] was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." *Id.*, at 186-187.

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11. In finding prejudice, the Eighth Circuit committed an obvious but common error. "In our view, fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment *solely because* of his attorney's error." *Fretwell* v. *Lockhart*, 946 F. 2d 571, 577 (CA8 1991) (emphasis added); cf. *Butler* v. *McKellar*, 494 U. S. 407, 430 (1990) (Brennan, J., dissenting). That is like saying that a nonswimmer who deliberately plunged into a deep lake has drowned "solely because" the rescuers did not reach him in time. Fretwell is sentenced to death *because* he murdered Sherman Sullins in the course of a robbery. See Pet. Cert. A-22. His choice to commit the crime is the cause of the penalty he has incurred. There is a remote chance that a better lawyer might have saved him, but that chance hardly converts the failed attempt into a cause, much less the sole cause.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

July, 1992

Respectfully submitted,

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record

APPENDIX A

Successful Habeas Petitioners		
Last Case	Ineff. Claim	Disp.
Magwood v. Smith, 791 F.2d 1438 (1986)	Yes	Proc.Def
Thomas v. Kemp, 796 F.2d 1322 (1986)	Yes	Accepted
Smith v. Wainwright, 799 F.2d 1442 (1986)	Yes	Accepted
Potts v. Kemp, 814 F.2d 1512 (1987)	Yes[1]	Accepted
Amadeo v. Kemp, 816 F.2d 1502 (1987)	Yes	Not Reached
Elledge v. Dugger, 823 F.2d 1439 (1987)	Yes	Denied
Christopher v. Florida, 824 F.2d 836 (1987)	Yes	Not reached
Magill v. Dugger, 824 F.2d 879 (1987)	Yes	Accepted
Bowen v. Kemp, 832 F.2d 546 (1987)	No	
Dix v. Kemp, 832 F.2d 546 (1987)	No[2]	
Hargrave v. Dugger, 832 F.2d 1528 (1987)	No	
Armstrong v. Dugger, 833 F.2d 1430 (1987)	Yes	Accepted
Dick v. Kemp, 833 F.2d 1448 (1987)	No	
Messer v. Florida, 834 F.2d 890 (1987)	Yes	Denied
Godfrey v. Kemp, 836 F.2d 1557 (1988)	Yes[3]	Denied
Jackson v. Dugger, 837 F.2d 1469 (1988)	No	
Stone v. Dugger, 837 F.2d 1474 (1988)	Yes	Denied
Corn v. Kemp, 837 F.2d 1477 (1988)	Yes[4]	Denied
Mann v. Dugger, 844 F.2d 1446 (1988)	No	
Stephens v. Kemp, 846 F.2d 642 (1988)	Yes	Accepted
Ruffin v. Dugger, 848 F.2d 1512 (1988)	Yes	Denied
Middleton v. Dugger, 849 F.2d 491 (1988)	Yes	Accepted
Cervi v. Kemp, 855 F.2d 702 (1988)	No	
Smith v. Zant, 855 F.2d 712 (1988)	Yes	Not reached
Berryhill v. Zant, 858 F.2d 633 (1988)	Yes	Not reached
Knight v. Dugger, 863 F.2d 705 (1988)	Yes	Denied

CONTINUED

Successful Habeas Petitioners - CONTINUED		
Jones v. Dugger, 867 F.2d 1277 (1989)	Yes	Denied
Harris v. Dugger, 874 F.2d 756 (1989)	Yes	Accepted
TOTALS Petitioners: 28	Ineff. Claims: 21	Accepted: 8 Denied: 9 Not reached: 4

Unsuccessful Habeas Petitions	
Last Case	Ineffectiveness Claim
Bowden v. Kemp, 793 F.2d 273	Yes, see 733 F.2d 740
Tafero v. Wainwright, 796 F.2d 1314	Yes
Tucker v. Kemp, 802 F.2d 1293	Yes, see 762 F.2d 1480
Hall v. Wainwright, 805 F.2d 945	Yes
Demps v. Wainwright, 805 F.2d 1426	No
Johnson v. Wainwright, 806 F.2d 1479	Yes
White v. Wainwright, 809 F.2d 1478	No
Dobbs v. Kemp, 809 F.2d 750	Yes, see 790 F.2d 1499
Ritter v. Smith, 811 F.2d 1398	No
Mulligan v. Kemp, 818 F.2d 746	Yes, see 771 F.2d 1436
Tucker v. Kemp, 818 F.2d 749	Yes, see 762 F.2d 1496
High v. Kemp, 819 F.2d 988	Yes
Lindsey v. Smith, 820 F.2d 1137	Yes, see 820 F.2d 1137
Foster v. Dugger, 823 F.2d 402	Yes
Darden v. Dugger, 825 F.2d 287	Yes
Booker v. Dugger, 825 F.2d 281	Yes
White v. Dugger, 828 F.2d 10	No
Ritter v. Thigpen, 828 F.2d 662	Yes

CONTINUED

Unsuccessful Habeas Petitions - CONTINUED	
Mitchell v. Kemp, 827 F.2d 1433	Yes
Lightbourne v. Dugger, 829 F.2d 1012	Yes, 829 F.2d 1012
McCorquodale v. Kemp, 829 F.2d 1035	No
Davis v. Kemp, 829 F.2d 1522	Yes
Messer v. Kemp, 831 F.2d 946	Yes
Clark v. Dugger, 834 F.2d 1561	Yes, see 834 F.2d 1561
Presnell v. Kemp, 835 F.2d 1567	No
Fleming v. Kemp, 837 F.2d 940	Yes, see 560 F.Supp. 525
Daugherty v. Dugger, 839 F.2d 1426	Yes
Willis v. Kemp, 838 F.2d 1510	Yes, see 720 F.2d 1212
Smith v. Dugger, 840 F.2d 787	Yes
Julius v. Johnson, 840 F.2d 1533	Yes, see 840 F.2d 1533
Buford v. Dugger, 841 F.2d 1057	Yes
Harich v. Dugger, 844 F.2d 1464	Yes
Williams v. Kemp, 846 F.2d 1276	Yes
Stewart v. Dugger, 847 F.2d 1486	Yes, see 847 F.2d 1486
Bundy v. Dugger, 850 F.2d 1402	Yes
Dunkins v. Thigpen, 854 F.2d 394	Yes, see 854 F.2d 344
Singleton v. Thigpen, 856 F.2d 126	Yes, see 847 F.2d 668
Gates v. Zant, 863 F.2d 1492	Yes
Richardson v. Johnson, 864 F.2d 1536	Yes
Griffin v. Dugger, 874 F.2d 1277	Yes, see 760 F.2d 1505
TOTALS Petitioners: 40	Ineff. Claims: 34

1. See 575 F.Supp. 374, 387.
2. Consolidated with Bowen v. Kemp. See 832 F.2d, at 620.
3. See 613 F.Supp. 737, 758-760.
4. See 708 F.2d 549, 560.

No. 91-1393

In The

Supreme Court of the United States

October Term, 1992

A.L. LOCKHART,

Petitioner,

v.

BOBBY RAY FRETWELL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KENTUCKY, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
WARD A. CAMPBELL
Deputy Attorney General
MARK L. KROTOSKI
*Special Assistant Attorney General
1515 K Street, Suite 603
Sacramento, CA 95814
Telephone: (916) 324-5497
Attorneys for Amici
*Counsel of Record
July 24, 1992

[additional counsel on inside cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNSEL

James H. Evans
Attorney General
of Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130
(205) 242-7300

Charles E. Cole
Attorney General of
Alaska
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-3600

Grant Woods
Attorney General of
Arizona
1275 West Washington
Phoenix, AZ 85007
(602) 542-5025

Gale A. Norton
Attorney General of
Colorado
110 Sixteenth Street
10th Floor
Denver, CO 80202
(303) 620-4500

Richard N. Palmer
Chief State's Attorney
State of Connecticut
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

Charles M. Oberly, III
Attorney General of
Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-3838

Robert A. Butterworth
Attorney General
of Florida
The Capitol
Tallahassee, FL 32399-1050
(904) 487-1963

Larry EchoHawk
Attorney General of Idaho
Statehouse, Room 207
Boise, ID 83720
(208) 334-2400

Chris Gorman
Attorney General
of Kentucky
State Capitol, Room 116
Frankfort, KY 40601
(502) 564-7600

Marc Racicot
Attorney General of
Montana
Justice Building
215 North Sanders
Helena, MT 59620
(406) 444-2026

Don Stenberg
Attorney General of
Nebraska
Department of Justice
2115 State Capitol
Building
Lincoln, NE 68509-8920
(402) 471-2682

Frankie Sue Del Papa
Attorney General of
Nevada
Heroes Memorial
Building
Carson City, NV 89710
(702) 687-4170

Robert J. Del Tufo
Attorney General
of New Jersey
Department of Law &
Public Safety
Richard J. Hughes
Justice Complex
Trenton, NJ 08625-0086
(609) 292-4925

Lacy H. Thornburg
Attorney General of
North Carolina
P.O. Box 629
Raleigh, NC 27602-0629
(919) 733-3377

Charles S. Crookham
Attorney General of
Oregon
100 Justice Building
Salem, OR 97310
(503) 378-4402

Ernest D. Preate, Jr.
Attorney General
of Pennsylvania
16th Floor,
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

T. Travis Medlock
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

Mark Barnett
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

Jeffrey L. Amestoy
Attorney General
of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

KENNETH O. EIKENBERRY
Attorney General of
Washington
Correction Division
P.O. Box 40116
Olympia, WA 98504-0116
(206) 586-1445

JOSEPH B. MEYER
Attorney General
of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

QUESTIONS PRESENTED

I. Whether the "prejudice" component of the Sixth Amendment right to effective assistance of counsel is established: (1) when counsel does not make an objection based upon prevailing federal appellate court precedent *at the time of the state trial*; (2) the federal appellate court precedent is subsequently overruled *by the time of federal habeas review*; and (3) the retroactive application of the new precedent does not affect the fundamental fairness or reliability of the state trial?

II. Whether States should be able to rely upon new precedent on collateral review when a habeas petitioner contends that his trial counsel failed to raise an objection that would have been potentially meritorious at the time of the state proceeding, but would no longer be valid in light of the new precedent?

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INTEREST OF *AMICI*

Amici States have a substantial interest in defending state court judgments which are *proven* to be valid based upon subsequent precedent. Ineffective assistance of counsel claims are raised in a majority of federal habeas corpus petitions challenging presumptively valid state court judgments, particularly in capital cases. To establish an ineffectiveness claim, habeas petitioners must show that the attorney's performance

was both deficient and prejudicial, under *Strickland v. Washington*, 466 U.S. 668 (1984). This case presents a fundamental question concerning the *prejudice* component of this standard.

More critically, the issue is whether on collateral review the State may defend its judgment by relying on precedent that was rendered after the state trial court judgment. If the States cannot rely on subsequent precedent, then habeas petitioners will be able to overturn their state court convictions and sentences based upon a "constitutional windfall" even though under current precedent the convictions and sentences would be deemed both fundamentally fair and reliable. Unless the Eighth Circuit majority holding is reversed, it will have serious ramifications on the administration of justice; the criminal justice interests in finality, comity, and judicial economy; the *Teague* doctrine; and the application of the prejudice component of the *Strickland* standard.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

In August, 1985, respondent Bobby Ray Fretwell was convicted by an Arkansas jury of capital felony murder. At the bifurcated sentencing hearing, the state trial court instructed the jury on two aggravating circumstances requested by the State and one mitigating circumstance urged by Fretwell's attorney. Fretwell's attorney did not object to either of the two aggravating circumstances instructions. The second of these instructions, at issue here, provided that the capital felony was committed for the purposes of pecuniary gain. A sentence of death was pronounced after the jury found the pecuniary gain aggravating circumstance was present and there were no mitigating circumstances. Fretwell's conviction and sentence were affirmed by the Arkansas Supreme Court, *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630, 634 (Ark. 1986), and his state collateral challenge was unsuccessful. *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180, 181 (Ark. 1987) (per curiam).

The U.S. District Court granted habeas relief on the ground that Fretwell was denied effective assistance of counsel under the Sixth and Fourteenth Amendments when his counsel failed to object to the pecuniary gain aggravating circumstance instruction based upon *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). Seven months before Fretwell's trial, the Eighth Circuit held in *Collins* that the pecuniary gain aggravating circumstance could not be considered in the sentencing phase of robbery/murder cases because it duplicated an element of the offense of robbery/murder established in the guilt phase. However, before federal habeas review in this case, the Eighth Circuit overruled its *Collins* decision in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).[1]

Even though *Collins* was overruled *at the time of federal habeas review*, the U.S. District Court issued the writ in this case because *Collins* was the law of the circuit *at the time of the state trial*. *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1338 (E.D. Ark. 1990). A divided panel of the Eighth Circuit affirmed the issuance of the writ. *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). This Court granted writ of certiorari. *Lockhart v. Fretwell*, 112 S.Ct. 1935, 118 L.Ed.2d 542 (1992).

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[1] The *Perry* court concluded that *Collins* was inconsistent with this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), which held that the same element could constitutionally be considered as part of the offense during the guilt phase and also as an aggravating circumstance during the sentencing phase of a capital trial. In *Lowenfield*, this Court concluded that the required narrowing function under the Eighth Amendment could be fulfilled by either the Legislature when it defined the substantive offense or by jury findings of aggravating circumstances during the penalty phase. *See id.* at 246. Although *Lowenfield* involved a Louisiana statute and *Collins* concerned an Arkansas statute, the Eighth Circuit in *Perry* concluded the state sentencing schemes were "indistinguishable in any significant detail." *See Perry*, 871 F.2d at 1393; *see also id.* (concluding "that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*," and holding *Collins* was "overruled by *Lowenfield*"); and note 17, *infra*. Among other things, the *Fretwell* majority attempted to distinguish the Louisiana statute in *Lowenfield* from the Arkansas statute, notwithstanding the Eighth Circuit's holding in *Perry*. *See Fretwell*, 946 F.2d at 575-77.

SUMMARY OF ARGUMENT

Most federal habeas corpus petitions, particularly in capital cases, contain claims alleging ineffective assistance of counsel. This case offers the Court an opportunity to provide further guidance on the prejudice component of the Sixth Amendment standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This case asks, in evaluating prejudice, whether the original precedent *at the time of the state proceeding* or the new precedent *at the time of federal habeas review* should be applied on collateral review when the fundamental fairness of the proceeding would not be affected by the retroactive application of the new precedent. As Justice Powell correctly framed the prejudice issue, "only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair." *Kimmelman v. Morrison*, 477 U.S. 365, 395 (1986) (Powell, J., concurring)

As this Court has already noted, "The object of an ineffectiveness claim is not to grade counsel's performance." *Strickland*, 466 U.S. at 697. Here, the Eighth Circuit vacated a state court decision because the respondent's trial counsel did not raise an objection based upon a federal appellate court decision that had since been overruled. The prejudice test proposed by Justice Powell in *Kimmelman*, 477 U.S. at 391-98, best advances the objectives of the Sixth Amendment and federal habeas review by focusing on the fairness and reliability of the proceeding, rather than simply grading counsel for errors that would make no difference today.

Unless this Court reverses the Eighth Circuit majority ruling, respondent will have obtained what the dissent accurately called a "constitutional windfall." The "windfall" occurs where, as here, the habeas petitioner obtains the benefit of a precedent in his favor even though that precedent has been overruled and despite the fact that the state court trial

was reasonable and fair under current constitutional standards. This windfall thwarts the State's ability to enforce its criminal laws and its interest in obtaining finality.

This case also concerns the ability of the States to uphold state court judgments by defending against collateral attacks based upon precedent which has ultimately been shown to be valid even though the prior related precedent may have been questioned at the time of the initial proceeding. This issue has not previously been addressed by the Court and was not raised in the related retroactivity analysis of *Teague* and its progeny. The issue presented under the *Teague* doctrine is when decisional law should *not* be retroactively applied. This case presents the converse situation: when *should* decisional law be retroactively applied.

Three scenarios are considered in this brief which explore the ramifications of a rule which would enable the State to rely upon subsequent precedent in limited situations on collateral review. Such a rule is consistent with the objectives of the *Teague* doctrine to preserve the integrity of state court judgments and promote the criminal justice interests in finality, comity and judicial economy. Just as the *Teague* doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions," *Butler v. McKellar*, 494 U.S. 407, 414 (1990), then, too, state court judgments which are ratified by subsequent precedent should similarly be vindicated. Only in this manner can the integrity of state court judgments be respected consistent with the principles underlying the *Teague* doctrine.

ARGUMENT

I. Justice Powell's Standard in *Kimmelman* for Determining Prejudice Should Govern Ineffective Assistance of Counsel Claims and Would Bar "Constitutional Windfalls"

In *Kimmelman v. Morrison*, Justice Powell noted that "it would shake [the right to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth

Amendment protects criminal defendants against errors that merely deny those defendants a windfall." 477 U.S. 365, 397 (1986) (Powell, J., concurring). In this case, the Eighth Circuit dissent correctly criticized the majority for affording respondent Fretwell a "constitutional windfall" by granting habeas relief on Sixth Amendment grounds. *Fretwell*, 946 F.2d at 579 (Loken, J., dissenting).

In *Strickland v. Washington*, this Court established two prongs – a performance component and prejudice component – both of which must be demonstrated in order for a defendant or habeas petitioner to obtain Sixth Amendment relief for ineffective assistance of counsel. *See* 466 U.S. 668, 687, 697 (1984). The parties have not disputed that the performance component has been satisfied in this case.[2] The central issue presented is whether the failure to object to the aggravating circumstance instruction – based upon prevailing federal appellate authority at the time of the state trial which had been reversed at the time of federal habeas review – *prejudiced* the outcome of the sentencing hearing.

In concluding the prejudice component was met, the Eighth Circuit majority emphasized that it was compelled to apply the law in effect *at the time of the state proceeding* even

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[2] While the petitioner may have conceded this point below, the *sole* basis for raising an objection during the state sentencing proceeding was premised on the now discredited and overruled *Collins* decision. *See* note 6, *infra* (citing numerous decisions rejecting or questioning *Collins* rule). The unfounded presumption of the Eighth Circuit majority was that Eighth Circuit precedent was necessarily binding on the Arkansas state trial court. *See Fretwell*, 946 F.2d at 577. Consequently, the Eighth Circuit majority "graded" defense counsel's performance in light of overruled Eighth Circuit precedent. Because the state court was not obligated to follow the *Collins* rule, the performance prong of the *Strickland* standard cannot be demonstrated. *See* text immediately following note 6, *infra*.

In fact, it may be in light of this Court's decision in *Jurek v. Texas*, 428 U.S. 262 (1976), that defense counsel decided not to assert a *Collins* objection. *See* note 17, *infra*. Further, the failure to object or assert an issue does not *automatically* establish the performance component. *See, e.g., Smith v. Murray*, 477 U.S. 527, 535-36 (1986). Nonetheless, the performance issue may not need to be reconciled since respondent is unable to establish *both* the performance and prejudice components in order to obtain Sixth Amendment relief. *See Strickland*, 466 U.S. at 697.

though this precedent had been subsequently overturned by the Eighth Circuit. *Fretwell*, 946 F.2d at 577 & n.8. As the dissent rightfully noted, "By focusing only on the probable effect of counsel's error *at the time of Fretwell's sentencing*, the majority *misses the broader and more important point* that his sentencing proceeding reached *neither an unreliable nor an unfair result*." *Id.* at 579 (Loken, J., dissenting) (emphasis added) (citing *Kimmelman*, 477 U.S. at 396-97 (Powell, J., concurring)).

Under the performance component of the *Strickland* test, this Court has noted that a reviewing court should assess "the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Strickland*, 466 U.S. at 690 (emphasis added); *see also Kimmelman*, 477 U.S. at 381, 385. While this Court has not addressed the point of time for assessing the prejudice component, this Court has made clear that the *Strickland* standard should not be mechanically applied and that "the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696 (emphasis added); *see also Kimmelman*, 477 U.S. at 395 (Powell, J., concurring) (reiterating that the standard "should not be applied too mechanically").

The standard propounded by Justice Powell was not applied to the facts presented in *Kimmelman* as it was not briefed by the parties nor considered by the lower federal courts. *Kimmelman*, 477 U.S. at 397-98 (Powell, J., concurring). This case presents an opportunity for this Court to hold, as Justice Powell urged in *Kimmelman*, that a habeas "windfall" should never be granted under the prejudice component of the Sixth Amendment *Strickland* standard where the fairness or reliability of the proceeding has not been placed in issue. *See id.* at 395, 396, 397 (Powell, J., concurring).[3]

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[3] Indeed, this case presents a more compelling reason for the adoption of Justice Powell's prejudice test. In *Kimmelman*, the ineffectiveness claim was based upon trial counsel's failure to file a Fourth Amendment suppression motion. In that case, the motion was still potentially meritorious under existing precedent

(Continued on following page)

II. The Eighth Circuit Majority Ruling Fails To Advance The Objectives Of Federal Habeas Review And The Sixth Amendment and Undermines The Principles Supporting The Retroactivity Analysis Adopted By This Court

A. The Ruling Does Not Promote the Objectives of Collateral Review

Neither of the two central purposes of federal habeas review is advanced by the Eighth Circuit majority application of the repudiated *Collins* rule.[4] *First*, habeas review advances a "deterrence function" by furnishing a "necessary additional incentive" to state courts to ensure federal rights are applied consistent with established constitutional standards at the time of their application.[5] To the extent that *Collins* was overruled and discredited, it is the Eighth Circuit majority which ensured an inconsistent application of constitutional standards. *See* note 17, *infra*.[6]

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at the time of collateral review. In contrast, in this case there is no dispute that the failure to object to the aggravating circumstance instruction was no longer meritorious. Only because the Eighth Circuit majority insisted on applying the overruled precedent was respondent able to obtain habeas relief.

[4] Although the same standards apply in evaluating ineffectiveness claims on direct or collateral review, *Strickland*, 466 U.S. at 697-98, most ineffectiveness claims arise on collateral review. *See Kimmelman*, 477 U.S. at 378, 379 n.3.

[5] *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting) (quoted in *Teague*, 489 U.S. at 306-07 (plurality opinion)); *see also Sawyer v. Smith*, 497 U.S. 227, ___, 110 S.Ct. 2822, 2827, 2830, 111 L.Ed.2d 193, 206, 209 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Butler v. McKellar*, 494 U.S. 407, 413 (1990); *Hunt v. Vasquez*, 899 F.2d 878, 880 (9th Cir. 1990) (considering deterrence function of federal habeas review on ineffective assistance of counsel claim seeking retroactive application of overruled state court ruling).

[6] In fact, not only did the Eighth Circuit finally overrule *Collins* in *Perry*, but numerous other courts, including the Arkansas Supreme Court, have either explicitly rejected or questioned the *Collins* rule. The Arkansas Supreme Court never followed *Collins* and applied *Lowenfield* retroactively since "appellants [are not] entitled to preserve in place a principle of law which has been held to be erroneous." *Ruiz v. State of Arkansas*, 299 Ark. 144, 772 S.W.2d 297, 302 (Ark.

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Clearly, the *sine qua non* of the majority opinion is that the Eighth Circuit precedent in *Collins* (even though subsequently overruled in *Perry*) was binding on the state court at the time of the trial. State courts are not bound by lower federal courts in interpreting federal constitutional law. *See, e.g.*, 1 Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance & Procedure* § 1.6(c), at 33 (3d ed. 1986). For example, the *Collins* rule would clearly not have been binding on the Arkansas courts if it had been rendered in another circuit; the fact that *Collins* was decided by the Eighth Circuit should not make a difference. In our national judicial system, state courts hold a co-equal status with the federal judiciary and are as competent in applying and deciding federal principles. *See, e.g., Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 210-11; *Stone v. Powell*, 428 U.S. 465, 495 n.35. The duty of the Arkansas state trial court was therefore not to apply Eighth Circuit precedent (as the *Fretwell* majority explicitly dictated, *see Fretwell*, 946 F.2d at 577 & n.8), but to apply, reasonably and in good faith, existing constitutional rules. *Cf. Butler*, 494 U.S. at 414.

At the time of federal habeas review, *Collins* obviously was not a correct statement of law. Rather than serving the deterrence function, the Eighth Circuit majority's insistence

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1989) (and citing several Arkansas Supreme Court cases rejecting the *Collins* rationale).

Other federal courts have expressly criticized and rejected *Collins*. *See, e.g., Rault v. Butler*, 826 F.2d 299, 306-07 (5th Cir.) (citing several Fifth Circuit cases rejecting *Collins*), *cert. denied*, 483 U.S. 1042 (1987); *Berry v. Phelps*, 819 F.2d 511, 516-17 (5th Cir. 1987) ("No circuit court has followed the Eighth Circuit decisions in *Collins*, and we have expressly rejected it on several occasions.") (citations omitted); *Ritter v. Thigpen*, 668 F. Supp. 1490, 1495-96 (S.D. Ala. 1987) (noting "the law in the Eleventh Circuit, both before and after the *Collins* decision, is just the opposite") (and cases cited therein).

At least one other circuit court has questioned and distinguished the *Collins* holding. *See, e.g., McKenzie v. Risley*, 842 F.2d 1525, 1539 n.30 (9th Cir.) ("We read *Collins* as grounded in the peculiar statutory scheme employed by Arkansas to define capital murder. In any event, we note that *Collins* did not discuss *Jurek* and was decided prior to *Lowenfield*."), *cert. denied*, 488 U.S. 901 (1988).

on applying *Collins* undeniably and inexplicably confers a constitutional windfall on respondent.

Second, habeas review "seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[7] Respondent Fretwell's innocence would not be affected by the application of *Perry* on federal habeas review.

B. The Ruling Erodes the Principles Underlying the *Teague* Doctrine

Substantial criminal justice interests – including the interests in finality and comity – dictate that a presumptively valid conviction and sentence should not be disturbed on collateral review unless a showing can be made that the state prisoner is in custody in violation of constitutional or federal rights, 28 U.S.C. § 2254(a), and this showing conforms with established requirements for federal habeas review.[8] These interests are reflected in and promoted by the framework of analysis adopted by this Court in determining whether and when to apply decisional law retroactively. These principles should be consistently maintained in this case.

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[7] *Desist*, 394 U.S. at 262 (Harlan, J., dissenting); *see also Stone*, 428 U.S. at 491 nn.30 & 31; *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (Powell, J., concurring) ("Habeas corpus indeed should provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty."); *Hunt*, 899 F.2d at 880 (considering role of innocence on federal habeas review on ineffective assistance of counsel claim seeking retroactive application of overruled state court ruling).

[8] Many of these habeas requirements promote the criminal justice interests in comity and finality. *See, e.g., Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640, 656 (1991) (applying independent and adequate state ground doctrine); *McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468, 1469, 113 L.Ed.2d 517, 542, 543 (1991) (abuse of the writ doctrine); *Teague v. Lane*, 489 U.S. 288, 299-310 (1989) (plurality opinion) (general doctrine against retroactive application of "new rules" on collateral review); *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986) (procedural default doctrine); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986) (general bar against successive petitions); *Rose v. Lundy*, 455 U.S. 509, 516, 518 (1982) (exhaustion doctrine under 28 U.S.C. §§ 2254(b), (c)); *Sumner v. Mata*, 449 U.S. 539, 550 (1981) (presumption of correctness to state court findings of fact under 28 U.S.C. § 2254(d)).

Under our criminal justice system, a state defendant may obtain the benefit of the retroactive application of *any* new rule at *any* time during the direct review process before the conviction becomes final. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). However, upon the conclusion of the direct review process, *see id.* at 321 n.6, "a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Strickland*, 466 U.S. at 697 (noting "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment").

The *Teague* doctrine advances the criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system.[9] Under the *Teague* doctrine, "new rules" (i.e., rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States) may not be retroactively applied or announced on collateral review unless the rule falls within one of two exceptions.[10] Concomitantly, under *Teague* and its progeny,

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[9] *See Stringer v. Black*, 503 U.S. at ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 377 (1992) ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (noting finality concerns under retroactivity doctrine are also applicable in capital sentencing proceedings); *Teague*, 489 U.S. at 308 (noting the criminal justice interests of comity and finality bear directly on the question of the scope of habeas review).

The heart of the *Teague* doctrine is premised upon the nature, function, scope and purpose of collateral review. *See Teague*, 489 U.S. at 306, 308, 312 (plurality opinion); *see also Saffle*, 494 U.S. at 488; *Butler*, 494 U.S. at 413. As Justice Harlan noted, "The relevant frame of reference [on the retroactivity question] is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the *purposes for which the writ of habeas corpus is made available*." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (emphasis added) (Harlan, J., concurring in part and dissenting in part) (quoted in *Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2830, 111 L.Ed.2d at 209; *Butler*, 494 U.S. at 413; *Teague*, 489 U.S. at 306).

[10] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Stringer*, 503 U.S. at ___, 112 S.Ct. at 1135, 117 L.Ed.2d at 376; *Sawyer*, 497 U.S. at ___,

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old rules (or rules which are not "new" within the meaning of *Teague*) may be considered on collateral review. *See, e.g., Penry*, 492 U.S. at 319-28 (considering and applying rule sought by petitioner which was deemed not "new" under the *Teague* doctrine). Therefore, only under limited circumstances (i.e., where the fundamental fairness and reliability of the proceeding is in issue) may "new" decisional law be retroactively applied to upset a presumptively valid state court judgment.

This case raises a similar question regarding the application of precedent to set aside a presumptively valid state court sentence. By insisting on the application of *overruled* precedent, the Eighth Circuit majority disregarded comity and federalism concerns and the interest in finality. The costs of this constitutional windfall for the respondent on the criminal justice system simply cannot be rationalized, especially when the windfall relief does not promote the fundamental fairness and reliability of the proceeding in any manner.

Viewed in this context, the concerns addressed by the *Teague* doctrine and the Powell-*Kimmelman* standard intersect. In essence, *Teague* and its progeny hold that a habeas petitioner should not obtain a "constitutional windfall" which would result from the retroactive application of a "new rule" on collateral review because such a windfall cannot be warranted in light of its effect on the interests in finality and comity. For identical reasons, the rule proposed by Justice

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110 S.Ct. at 2831, 111 L.Ed.2d at 211; *Butler*, 494 U.S. at 412; *Penry*, 492 U.S. at 313, 329.

The *Teague* doctrine, which is not an absolute bar to the announcement or application of new rules of law on collateral review, contains two important exceptions: (1) rules that place a class of conduct beyond the reach of the criminal law, or which prohibit the imposition of certain punishment for certain defendants because of their status or offense; and (2) watershed rules of criminal procedure concerning the accuracy and fairness of a criminal proceeding. *Sawyer*, 497 U.S. at ___, 110 S.Ct. at 2831, 111 L.Ed.2d at 211; *Saffle*, 494 U.S. at 494-95; *Butler*, 494 U.S. at 415-16; *Penry*, 492 U.S. at 329-30; *Teague*, 489 U.S. at 311-12 (plurality opinion).

Powell in *Kimmelman* avoids constitutional windfalls to petitioners on Sixth Amendment grounds. *Compare Teague*, 489 U.S. at 309-10 *with Kimmelman*, 477 U.S. at 397 (Powell, J., concurring). Further, the *Teague* doctrine seeks to vindicate reasonable state court interpretations of constitutional law at the time of the state trial. *Butler*, 494 U.S. at 414. In this case, this Court can vindicate a challenged state court sentence which has been validated by subsequent precedent, notwithstanding any alleged deficiency of defense counsel at the time of the state trial.

C. The Ruling Fails to Advance the Objectives of the Sixth Amendment Right to Effective Counsel

As this Court noted in *Strickland*, the substantive content of the Sixth Amendment right is guided by its purpose "to ensure a fair trial."[11] The key to promoting a fair proceeding is the adversarial process: "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685; *see also Kimmelman*, 477 U.S. at 374 ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance

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[11] 466 U.S. at 686; *see also Burger v. Kemp*, 483 U.S. 776, 788 (1987); *Kimmelman*, 477 U.S. at 392-93 (noting "the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's *right to a fundamentally fair trial* – a trial in which the determination of guilt or innocence is 'just' and 'reliable' ") (Powell, J., concurring) (citation omitted); *Strickland*, 466 U.S. at 684 ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the *fundamental right to a fair trial*.") (emphasis added); *id.* at 689; *id.* at 691-92; *id.* at 696 ("the ultimate focus of inquiry must be on the *fundamental fairness of the proceeding* whose result is being challenged") (emphasis added); *id.* at 697 ("An ineffectiveness claim . . . is an attack on the *fundamental fairness* of the proceeding whose result is challenged.") (emphasis added); *id.* at 700 (An ineffectiveness claim requires a habeas prisoner to show that "the justice of his sentence was rendered *unreliable by a breakdown in the adversary process* caused by deficiencies in counsel's assistance.") (emphasis added).

between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."); *Strickland*, 466 U.S. at 686-87 (noting defense counsel fulfills an adversarial role in a capital sentencing proceeding); *id.* at 696.

Outside of a narrow class of errors in which prejudice is presumed,[12] the effect of most defense counsel errors on the proceeding must be assessed in light of their impact on the proceeding. Just as "[t]here are countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, errors of counsel may arise in an "infinite" manner. *Id.* at 693. Certainly, to some extent, "*any* error . . . 'impairs' the presentation of the defense." *Id.* (emphasis added). But not every error by defense counsel calls into question the outcome of the adversarial hearing.

To address these concerns, the prejudice standard serves the Sixth Amendment purpose by supplying a screening function: permitting habeas relief *only* where the fundamental fairness or reliability of the trial is implicated by the alleged error. In the absence of this threshold showing, it cannot be said that the challenged error was "sufficiently serious to warrant setting aside the outcome of the proceeding." *Id.* In the context of a sentencing hearing, the prejudice determination turns on "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

The habeas petitioner has the burden of establishing prejudice. *Id.* at 693, 694, 696. In this case, the focus of the Sixth Amendment inquiry should be whether the respondent has met his burden by showing that retroactive application of the new precedent in *Perry* would render his sentence fundamentally unfair or unreliable. Where retroactive application of precedent would affect the fundamental fairness of the

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[12] This is not a case where prejudice is presumed, such as an actual or constructive denial of the assistance of counsel, or where counsel holds an actual conflict of interest leading to a breach of the duty of loyalty. *See Strickland*, 466 U.S. at 692; *see also Kimmelman*, 477 U.S. at 381 n.6; *id.* at 395 n.2 (Powell, J., concurring).

proceeding, the new precedent should not be applied retroactively. As Justice Powell put it, "only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair." *Kimmelman*, 477 U.S. at 395 (Powell, J., concurring); *see also Nix v. Whiteside*, 475 U.S. 157, 184-85 (1986) (Blackmun, J., concurring) (counsel's efforts to preclude perjured testimony could not cast doubt on the reliability of the trial).

Ordinarily a reviewing court might assess prejudice in the context of precedent prevailing at the time of the trial. But as this Court has already recognized, the *Strickland* standard is not to be mechanically applied. *Strickland*, 466 U.S. at 696; *see also Kimmelman*, 477 U.S. at 395 (Powell, J., concurring). Only in limited circumstances where prejudice may be presumed is a "fairly rigid rule" of prejudice applied. *Strickland*, 466 U.S. at 692; *see also* note 12, *supra*. This case demonstrates, under the prejudice component, why artificial application of precedent available at the time of the state proceeding is inconsistent with the objectives of federal habeas review and the Sixth Amendment. To apply *Collins* rigidly on collateral review only perpetuates the erroneous holding of that opinion, which has been rejected by other courts considering the issue. *See* note 6, *supra*.

In this case, respondent has not satisfied his burden of establishing prejudice because he has not met the threshold showing that the sentencing proceeding was fundamentally unfair or unreliable as a result of his trial counsel's error. The record shows that respondent's defense counsel did not object to the aggravating circumstance instruction during the sentencing phase of the state trial. The only legal basis for raising an objection rested upon the *Collins* holding. However, precedent of this Court, and other federal courts, as well as the Arkansas Supreme Court and a subsequent ruling of the Eighth Circuit, have removed any basis that may have existed under *Collins* for asserting an objection during the state sentencing proceeding. *See* note 6, *supra*, & note 17, *infra*.

Consequently, the challenged error in this case is the type which ultimately "had no effect on the judgment." *Strickland*, 466 U.S. at 691. The adversarial balance has not been upset where defense counsel fails to raise an objection that subsequent precedent has rendered meritless. Under these circumstances, neither the reliability nor the fairness of the sentencing proceeding has been called into question.

D. Unless the "Constitutional Windfall" Countenanced By The Eighth Circuit Majority Is Reversed, Substantial And Unjustifiable Costs To The Criminal Justice System Will Be Incurred

Federal habeas review and the Sixth Amendment guarantee of the right to effective assistance of counsel both seek to ensure that the petitioner has received a constitutionally fair and reliable trial. Both the *Teague* doctrine and the Powell-*Kimmelman* standard preserve these guarantees without compromising the interests of the criminal justice system in finality, comity and judicial economy. In this manner, they minimize unjustifiable costs on the administration of justice.[13] Under both standards, only when the requisite showing has been made should habeas relief be granted.

For example, granting habeas relief in this case merely on the basis of a non-prejudicial windfall certainly does not

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[13] In determining the scope of collateral review, several decisions of this Court have considered the "costs" of collateral review on our criminal justice system and on the States. *See, e.g., Coleman*, 501 U.S. at ___, 111 S.Ct. at 2559, 115 L.Ed.2d at 662 (noting "most of the *price* paid for federal review of state prisoner claims is paid by the States") (emphasis added); *McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1468, 113 L.Ed.2d at 542 (discussing "the significant costs of federal habeas corpus review"); *Teague*, 489 U.S. at 310 (noting costs imposed on States from retroactive application of new rules on habeas review) (citation omitted); *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (noting collateral review "entails significant *costs*") (emphasis added); *see also Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring) ("The *costs* imposed upon the State by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.") (emphasis added).

advance the interest in finality.[14] The granting of habeas relief in this case disregards sovereignty and comity interests, as the enforcement of state law is frustrated. *See, e.g., McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1469, 113 L.Ed.2d at 543; *Teague*, 489 U.S. at 309 (plurality opinion).

Federal-state relations are particularly exacerbated where the State is precluded from resentencing Fretwell, as the Eighth Circuit majority expressly held in remanding the case. *See Fretwell*, 946 F.2d at 577-78. The interest in judicial economy is also not promoted, especially where the fundamental fairness of the initial sentencing hearing has not been questioned, and limited judicial resources have been unnecessarily expended.[15] For these reasons, the Eighth Circuit majority ruling, if left undisturbed, may, as applied in some cases, "be more intrusive than the enjoining of criminal prosecutions." *Teague*, 489 U.S. at 310 (citing *Younger v. Harris*, 401 U.S. 37, 43-54 (1971)).

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[14] *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (noting the prejudice requirement in challenging the validity of a guilty plea on grounds of ineffectiveness "serve[s] the fundamental interest in the finality of guilty pleas"); *but see Strickland*, 466 U.S. at 694 (in determining that the prejudice standard for ineffectiveness claims should not be governed by a preponderance of the evidence standard, noting that the interest in finality must be counterbalanced to some extent by the interest in reliability).

Numerous opinions of this Court and commentators have noted the role of finality in the federal habeas process. *See, e.g., McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1468-69, 113 L.Ed.2d at 542-43; *Teague*, 489 U.S. at 309 (plurality opinion); *Engle*, 456 U.S. at 127; *Stone*, 428 U.S. at 491 n.31; *Mackey*, 401 U.S. at 683, 690-91 (Harlan, J., concurring and dissenting); *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-51 (1963).

[15] *See Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1719, 118 L.Ed.2d 318, 329 (1992) (noting interest in judicial economy); *McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1469, 113 L.Ed.2d at 543 (noting "heavy burden on scarce federal judicial resources" which impacts the ability "of the system to resolve primary disputes"); *Stone*, 428 U.S. at 491 n.31 (noting impact of habeas review on "the most effective utilization of limited judicial services"); *Schneckloth*, 412 U.S. at 261 (Powell, J., concurring) ("After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.").

III. Repercussions on the *Teague* Doctrine and the *Strickland* Standard

The *Teague* doctrine addresses the frequent situation when a habeas petitioner seeks the benefit of a "new rule" of constitutional law to overturn his conviction or sentence – a rule not available when the state conviction became final. *Griffith*, 479 U.S. at 321 n.6. The *Teague* doctrine does not deal with the converse situation: when the State asserts subsequent precedent (either a "new rule" or old rule clarifying or overturning prior lower federal court precedent) to uphold the presumptively valid state court judgment. That issue is presented in this case.

Normally, a habeas petitioner would not seek the announcement or application of a new rule on collateral review unless the petitioner benefitted by it. *See, e.g., Wright v. West*, 112 S.Ct. ___, 118 L.Ed.2d ___, 60 U.S.L.W. 4639, 4648 (1992) (Souter, J., concurring). Consequently, this issue will not arise in most habeas proceedings since petitioners generally lack sufficient incentives to present the question. However, in a small class of cases, the State will not only have the incentives to seek application of the new rule, but the criminal justice interests in finality and comity will call for its application.

This "converse" circumstance where the State (instead of the habeas petitioner) would seek to apply subsequent precedent on collateral review will ordinarily arise in two manners: (1) when a state court has made a ruling against a defendant that is challenged as erroneous at the time of the state trial, but would not be invalid in light of subsequent precedent on federal habeas review; or (2) as in this case, when a habeas petitioner or defendant contends that his counsel failed to raise an objection or investigate an issue that would have been meritorious at the time of the state proceeding, but would no longer be valid in light of subsequent precedent.[16]

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[16] While this Court has already *suggested* in passing that "a State could . . . rely on a decision announced after a petitioner's conviction and sentence

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The ability of the States to rely on the new precedent is consistent with the finality and comity interests underlying the *Teague* doctrine. If, under the *Teague* doctrine, States may correctly defend state court judgments that were reasonable at the time of the state court proceeding, but subsequently proven to be erroneous, then concomitantly States should be able to defend those state court judgments when the subsequent precedent has proven to be correct and reasonable under current law as long as the fundamental fairness of the proceeding has been unaffected by the retroactive application of the subsequent precedent. As this Court has established this proposition in the related situation where habeas petitioners seek retroactive application of a new rule, the *Teague* doctrine "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827, 111 L.Ed.2d at 206; *see also Butler*, 494 U.S. at 415 (considering whether proposed rule "was susceptible to debate among reasonable minds"). It only follows that if the *Teague* doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be *contrary* to later decisions," *Butler*, 494 U.S. at 414 (emphasis added), then the finality and comity principles underlying the *Teague* doctrine should also serve to ratify state court applications of law which are subsequently proven to be *correct*, notwithstanding, as here, contrary intermediate federal precedent.

Three scenarios[1] illustrate the potential ramifications of the Eighth Circuit majority ruling on the *Strickland* standard and the principles underlying the *Teague* doctrine. These examples include the circumstances where:

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became final to defeat his claim on the merits," it has not directly considered this issue. *Stringer*, 112 S.Ct. at 1139, 117 L.Ed.2d at 382. This case therefore presents an opportunity for this Court to hold that States may assert subsequent corrective precedent on Sixth Amendment claims where the fundamental fairness and reliability of the proceeding would not be affected.

(1) as under the facts of this case, the subsequent precedent did not establish a "new rule" within the meaning of *Teague* (and the State would benefit by the retroactive application of this precedent);

(2) the habeas petitioner would benefit by precedent available at the time of the State proceeding but would not by the subsequent "new rule" (and the State would benefit by the retroactive application of the "new rule"); and

(3) the petitioner would benefit by a "new rule" but would not by precedent at the time of the State proceedings.

Under each scenario, the two hypothetical situations where the State would seek to apply subsequent precedent on collateral review are considered: *first*, when the state court makes a ruling which is challenged as erroneous at the time of the state trial but which is subsequently proven to be correct; and *second*, when an ineffectiveness claim is asserted for the failure of defense counsel to raise an objection based upon precedent applicable at the time of the trial but which precedent is subsequently invalidated.

A. Scenario One: Subsequent Precedent Is Not A "New Rule"

The first scenario pertains to the facts of the instant case. In *Perry v. Lockhart*, the Eighth Circuit overruled its decision in *Collins* and noted that the *Perry* ruling is not a "new rule" within the meaning of *Teague*.[17] Under either hypothetical

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[17] The *Perry* court held that its holding did not constitute a "new rule" because overruling *Collins* was a direct extension of this Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *See Perry*, 871 F.2d at 1394 & n.8 (noting *Lowenfield* "did not announce a new rule" because it "merely applied a rule that had been announced in *Jurek* [*v. Texas*, 428 U.S. 262 (1976)]"); *see also Fretwell*, 946 F.2d at 579 (Loken, J., dissenting) (noting under *Perry*, *Lowenfield* did not establish a new rule and should be applied retroactively).

Arguably then, even prior to *Lowenfield*, the *Perry* holding was an extension of *Jurek*. It could be because of this Court's holding in *Jurek* that defense counsel

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situation, the State should be permitted to assert the *Perry* holding on collateral review since the fundamental fairness or the reliability of the sentencing phase of the trial will not be affected by doing so.

1. Initial State Court Ruling Challenged As Erroneous

The first hypothetical involves the situation where the state court makes an initial ruling which is challenged as erroneous based upon precedent at the time of the state proceeding. We may assume that – unlike the specific facts of this case – defense counsel actually objected to the jury instruction on pecuniary gain as an aggravating circumstance, relying upon *Collins*. The state court nonetheless overrules the objection and gives the instruction. After the state trial, but before collateral review, the *Perry* decision is announced, which permits the pecuniary gain instruction. Nevertheless, the defendant files a habeas petition challenging the state trial court's instruction in light of *Collins*.

In this situation, consistent with the *Teague* doctrine, the State would properly assert the *Perry* holding, which would apply retroactively on collateral review because *Perry* is not a new rule. Although *Perry* did not rely directly upon the *Teague* doctrine, there is no doubt that *Lowenfield* is not a "new rule" since it did not constitute the application of an "old rule" (i.e., *Jurek*) in a manner that was not dictated by precedent. *Stringer*, 112 S.Ct. at 1135, 117 L.Ed.2d at 377. Since *Perry* is clearly an "old rule," no retroactive application of a "new" rule is raised by its application. Importantly, only by applying *Perry* retroactively on collateral review may a constitutional windfall be avoided and may the criminal justice interests in comity and finality be promoted in this situation.

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did not raise a *Collins* objection at the time of the sentencing hearing (i.e., the motion would have been futile). At least one federal court has distinguished *Collins* for failing, in part, to discuss *Jurek*. *See McKenzie*, 842 F.2d at 1539 n.30.

2. Sixth Amendment Ineffectiveness Claim

The alternative hypothetical situation concerning an ineffective assistance of counsel claim represents the facts actually presented in this case. Here, defense counsel failed to raise a *Collins* objection during the state sentencing phase. Prior to collateral review, *Collins* was overruled in *Perry*, which, as already noted, is not a new rule within the meaning of *Teague*. *See* note 17, *supra*. On federal habeas review, respondent has alleged ineffective assistance of counsel because his trial attorney failed to raise the *Collins* objection.

In contrast to the prior example, involving review of a state court ruling, this illustration places the conduct of defense counsel in issue.[18] Specifically, under the Sixth

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[18] At first glance it might appear that the focus of Sixth Amendment ineffective assistance of counsel habeas claims is wholly distinct from other non-Sixth Amendment habeas claims. In fact, these claims are closely related for two separate reasons.

First, it is true that other habeas claims may call into question the conduct of other actors, including the *judge*, *prosecutor*, *jury*, *law enforcement*, or other officials. *See, e.g.*, note 22, *infra* (noting myriad of ways by which similar habeas issues may be presented concerning similar questions of law). In contrast, Sixth Amendment habeas claims require review of the conduct of the petitioner's *defense counsel*. However, the common thread among these claims is the impact these collateral attacks may have on the criminal justice interests in finality and comity.

Second, there is a common thread between claims reviewed under the *Teague* doctrine and Sixth Amendment claims in that both involve review of State action. For example, in considering the application or announcement of a rule on collateral review sought by a habeas petitioner, a federal habeas court, under the *Teague* doctrine, focuses on the rulings of the *state court*. *See Saffle*, 494 U.S. at 488 (In determining "what constitutes a new rule, [the] task is to determine whether a *state court* considering [the] claim at the time [the] conviction became final would have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution.") (emphasis added); *Butler*, 494 U.S. at 414 ("The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by *state courts* even though they are shown to be contrary to later decisions.") (emphasis added). While it is defense counsel's conduct that precipitates a Sixth Amendment violation, this conduct is imputed to the State. *See, e.g., Coleman*, 501 U.S. at ___, 111 S.Ct. at 2567, 115 L.Ed.2d at 672 (noting that "it is not the gravity of the attorney's error

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Amendment *Strickland* standard, the question is whether the failure to object *prejudiced* the outcome of the sentencing proceeding. Only because the Eighth Circuit majority required the application of *Collins* as the law *at the time of the state trial* and precluded the application of *Perry on collateral review* for purposes of determining prejudice under the *Strickland* standard, was respondent able to obtain a constitutional windfall on grounds of ineffective assistance of counsel.

For reasons analogous to the first hypothetical, the State should be able to rely on *Perry* to rebut the Sixth Amendment claim. The failure of defense counsel to object to the pecuniary gain instruction has not affected the fundamental fairness and reliability of the trial – there is no reason to lose confidence in its outcome. *See Kimmelman*, 477 U.S. at 395 (Powell, J., concurring). There is no reason why *Perry*, an "old rule," should not apply and its application does not raise any due process questions.[19]

As demonstrated by this first scenario, unless the Eighth Circuit majority ruling is reversed by this Court, two related consequences will expectedly follow in the Sixth Amendment context. *First*, absent a contrived Sixth Amendment claim, the constitutional windfall will not be available since the case will be governed by the precedent, the "old rule," in place at the time of collateral review. *Second*, and concomitantly, such

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that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.*, 'imputed to the State' "); *Kimmelman*, 477 U.S. at 379 ("The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.") (and citations therein).

[19] *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) (retroactive application of new precedent may not offend due process); *see also Hunt*, 899 F.2d at 881 (retroactive application of state court ruling did not constitute a change in the law and therefore did not violate any due process rights); *accord Washington v. Murray*, 952 F.2d 1472, 1480-81 (4th Cir. 1991) (retroactive application of *Payne v. Tennessee* would not offend due process).

Sixth Amendment claims will be used to undermine the finality and comity interests of the state explicated in *Teague* without advancing the purpose of federal habeas review.

B. Scenario Two: Petitioner Benefits By Precedent Available At The Time of the State Proceedings But Not By The Subsequent "New Rule"

A new hypothetical example also at the capital sentencing stage demonstrates that, in limited circumstances, the State should be able to assert "new rules" retroactively on collateral review to uphold presumptively valid state court judgments. As will be shown, this retroactive application of a new rule to uphold state court judgements is actually consistent with the *Teague* doctrine and the Powell-*Kimmelman* approach of balancing finality and comity with the Constitution's interest in ensuring a fundamentally fair and reliable proceeding.

1. Sixth Amendment Ineffectiveness Claim

In *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), this Court held that the Eighth Amendment precludes the admission of victim impact evidence or a prosecutor's statements concerning the personal qualities of the victim during the sentencing phase of a capital trial. Suppose, for purposes of the hypothetical, that the ineffective assistance of counsel claim was predicated on a failure to object to the introduction of victim impact evidence or prosecutorial statements during the penalty stage of a capital case under either *Booth* or *Gathers*, which governed *at the time of the state capital proceeding*. Assume further that *at the time of federal habeas review*, *Payne v. Tennessee*, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), had been rendered, which explicitly overruled *Booth* and *Gathers*, and removed the bar against the admission of such victim impact evidence or statements. Finally, assume that the evidence introduced into the penalty phase proceeding was clearly admissible as it was identical to that presented and upheld in *Payne*.

It is clear that *Payne* constitutes a new rule under the *Teague* doctrine, as it was not dictated by prior precedent and certainly broke new jurisprudential ground.[20] Analogous to the facts of the present case, the contention of the hypothetical habeas petitioner would be that ineffective assistance of counsel was rendered by the failure to object under *Booth* or *Gathers*, which applied during the state sentencing phase. Normally, under the *Teague* doctrine, a new rule is not retroactively applied on collateral review unless the rule falls within one of two narrow exceptions. *See* note 10, *supra*. However, in light of the subsequent holding in *Payne*, granting Sixth Amendment relief on habeas review on the basis of *Booth* and *Gathers* would be nothing other than a constitutional windfall. Simply put, in the absence of an unfair or unreliable proceeding, no showing of prejudice has been demonstrated for purposes of the Sixth Amendment.[21]

Realistically, because the new rule in *Payne* would not benefit the typical habeas petitioner, it is unlikely that a habeas petitioner would seek its application on collateral review. *But see Robison*, 943 F.2d at 1217-18 (determining whether *Payne* required reversal of prior federal appellate court holding concerning admissibility of victim impact evidence). However, under this scenario the habeas petitioner who can present a Sixth Amendment claim based upon the rationale of the Eighth Circuit majority opinion would be

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[20] *See, e.g., Saffle*, 494 U.S. at 488 ("The explicit overruling of an earlier holding no doubt creates a new rule."); *Butler*, 494 U.S. at 412 ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.' "); *Teague*, 489 U.S. at 301 (plurality opinion); *see also Robison v. Maynard*, 943 F.2d 1216, 1217-18 (10th Cir. 1991) (suggesting, in alternative holding, that *Payne* constitutes a "new rule" under the *Teague* doctrine).

[21] *See Kimmelman*, 477 U.S. at 395 (Powell, J., concurring); *see also Washington*, 952 F.2d at 1480-81 (on ineffectiveness claim for failure to object under *Booth*, holding that even assuming *arguendo* that ( ) counsel should have anticipated *Booth*, or (2) *Booth* was retroactively applicable at the time of trial, no prejudice could be demonstrated because *Booth* had subsequently been overruled by *Payne* which would apply on resentencing).

rewarded with habeas relief.[22] This scenario, similar to the facts currently before the Court, demonstrates one of the rare situations when the State should be able to rely on a new rule in order to uphold the state court judgment *as long as* the fundamental fairness of the proceeding is not put into question. The costs to the criminal justice interests in finality and comity cannot otherwise be justified.

2. Initial State Court Ruling Challenged As Erroneous

Although these facts are not currently before the Court, for the sake of completeness, we may consider the situation where the state trial court erroneously permits the introduction of victim impact evidence or prosecutorial statements over defense counsel's objection. It is clear under our hypothetical that at the time of the state trial this ruling violated *Booth* or *Gathers*. However, at the time of federal habeas review, *Payne* had been rendered. In our hypothetical, there is no dispute over the admissibility of the evidence as the evidence is identical to that found admissible in *Payne*. The State would seek to rely on the new rule in *Payne* to defend the state court judgment. Only where the fundamental fairness or reliability of the proceeding would be undermined by the retroactive application should the State be barred from asserting the new rule.[23]

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[22] A myriad of habeas claims might be asserted, including challenges to: (1) the admission of evidence; (2) the trial court's jury instruction; (3) the statements of the prosecutor; (4) the failure of defense counsel to object to the jury instruction; or (5) the failure of defense counsel to object to the admission of evidence.

[23] *Compare Bouie*, 378 U.S. at 353-54 (retroactive application of new precedent may not offend due process) *and Marks v. United States*, 430 U.S. 188, 196 (1977) (Due Process Clause precludes retroactive application of judicially announced standards which may impose criminal liability for conduct not previously punishable) *with Osborne v. Ohio*, 495 U.S. 103, 116-17 (1990) (due process not offended where there is fair notice that the conduct is criminal).

C. Scenario Three: On Sixth Amendment Ineffectiveness Claim, Petitioner Benefits By "New Rule" On Collateral Review But Not By Precedent At The Time of the State Proceedings

Finally, assume that the holding in *Payne* applied *at the time of the state sentencing phase* and permitted the introduction of victim impact evidence. Our hypothetical counsel fails to object to two separate pieces of victim impact evidence, one which meets the Eighth Amendment admissibility standard under *Payne*, the other violating the more stringent Due Process Clause standard reiterated in *Payne*, 111 S.Ct. at 2608, 115 L.Ed.2d at 735. Then assume, *arguendo*, that *at the time of federal habeas review*, the *Booth* and *Gathers* decisions had been rendered, expressly overruling the Eighth Amendment rule of admissibility of *Payne*. The new *Booth* and *Gathers* decisions would constitute a new rule within the meaning of *Teague*, *compare* note 20, *supra*, and would not apply retroactively on collateral review unless one of the two *Teague* exceptions were satisfied. *See* note 10, *supra*.

Under this example, the habeas petitioner would seek the benefit of the new rules under *Booth* and *Gathers* in an ineffective assistance of counsel claim, relying upon the rationale of the Eighth Circuit majority ruling. As to the evidence which would have been admissible under *Payne*, no ineffective assistance of counsel claim can be established since no lawyer could have anticipated either *Booth* or *Gathers* and no prejudice could be established. In contrast, an objection should have been raised to the evidence which would have violated the long-standing due process standard repeated in *Payne*. Under this latter situation, it would not necessarily constitute a windfall to grant relief on Sixth Amendment grounds as the fundamental fairness and reliability of the state sentencing proceeding arguably may have been affected by the introduction of the victim impact evidence in violation of the Due Process Clause.[24]

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[24] Alternatively, assume that the hypothetical defense counsel objected to the introduction of both pieces of victim impact evidence at the sentencing

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D. Summary

These three scenarios illuminate the potential impact of the Eighth Circuit majority ruling on the principles underlying the *Teague* doctrine and the prejudice component of *Strickland*. In the limited circumstances noted, in order to avoid a constitutional windfall, States should be permitted to assert subsequent precedent on collateral review to uphold presumptively valid state court judgments. Only where the fundamental fairness of the state proceeding would be undermined by this retroactive application of precedent should the State be precluded from asserting the subsequent precedent. In assessing prejudice on a Sixth Amendment claim, the fundamental fairness of the retroactive application of the intervening precedent can be measured under the standard proposed by Justice Powell. *See Kimmelman*, 477 U.S. at 396, 397 (Powell, J., concurring). Although the issue is not raised in this case, it is worth noting the parallelism with the situation where a State would seek to rely upon new precedent where an initial state court ruling is challenged. In this context, the fundamental fairness of the retroactive application

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hearing. At the time of the trial, the first evidence would be admissible under *Payne*, while the second evidence would not be. Assume, then, that the state trial court admits both pieces of evidence, overruling defense counsel's objection. Before federal habeas review, *Booth* and *Gathers* are handed down.

On collateral review, the habeas petitioner might seek retroactive application of *Booth* and *Gathers*. In this situation, unless the petitioner could successfully argue that one of the *Teague* exceptions would permit the retroactive application of the new rule, neither *Booth* nor *Gathers* would be retroactively applied. This is consistent with the retroactivity analysis adopted by this Court. If *Booth* and *Gathers* had come down at any point during the direct review process, then the hypothetical defendant would be able to obtain the benefit of these new rules. *See Griffith*, 479 U.S. at 328. Because in the hypothetical example the new rules were rendered after the conviction became final, the *Teague* doctrine advances the interests in finality and comity by barring the retroactive application of the new rules unless one of the two narrow exceptions applies. *See Teague*, 489 U.S. at 309-10 (noting finality and comity interests). *Independent* of requesting application of the new rules, the habeas petitioner may challenge the propriety of the state court ruling admitting evidence which violated the due process standard reaffirmed in *Payne*.

would be governed by the due process standard. *See Marks*, 430 U.S. at 196; *Bouie*, 378 U.S. at 353-54; *see also Hunt*, 899 F.2d at 881. In both circumstances, where the fundamental fairness would not be implicated, the criminal justice interests in finality and comity would be promoted by the retroactive application.

Unless the States can assert the subsequent precedent in this case and under similar circumstances, several consequences will likely follow. *First*, neither the purpose of habeas review nor of the Sixth Amendment will be advanced and the presumptively valid state court convictions and sentences will be upset. Arguably, the interests in finality and comity under these circumstances is even more compelling than that noted in *Teague*, since subsequent precedent has established the legitimacy of the initial state court ruling or conduct of counsel in question.

Second, the finality and comity interests underlying the *Teague* doctrine will be undermined. Further, because of the constitutional windfall at stake under the Eighth Circuit majority opinion, habeas petitioners will have tremendous incentives to dress up claims based on "old rules" in the clothes of ineffective assistance of counsel claims in order to obtain habeas relief.

Third, the Eighth Circuit majority ruling will also undermine the prejudice component of the *Strickland* standard. The Eighth Circuit majority presumed that both prongs of the *Strickland* test required a mechanical application and evaluation of precedent prevailing at the time of the state trial. In a footnote, the Eighth Circuit majority observed that the Eighth Circuit's *Perry* decision overruling *Collins* was not dispositive since "the question before us is whether Fretwell's [state] trial court, *at the time of his trial*, would have followed *Collins*." *Fretwell*, 946 F.2d at 577 n.8 (emphasis in original). The majority concluded "that a reasonable state trial court" would have sustained a *Collins* objection if one had been made since *Collins* constituted valid precedent at the time of the trial and "state courts are bound by the Supremacy Clause to obey federal constitutional law." *Id.* at 577.

Instead, *Strickland* only teaches that hindsight and second-guessing of counsel's performance must be eliminated in assessing the performance component of *Strickland*. *See Strickland*, 466 U.S. at 689. The *Strickland* standard does not dictate – nor should it – such a constrained and rigid application of the prejudice prong. Because "the ultimate focus of inquiry must be on the *fundamental fairness* of the proceeding whose result is being challenged," this Court rejected such a mechanical approach. *Id.* at 696 (emphasis added).

As has been demonstrated, it is entirely consistent with the principles of the *Teague* doctrine and the Sixth Amendment to allow the State to seek application of what would constitute a "new rule" in *some* habeas cases for purposes of assessing prejudice under the *Strickland* standard. Both the Powell-*Kimmelman* prejudice standard and the *Teague* doctrine seek to preclude a "constitutional windfall" which would undermine the function of habeas review and disregard the criminal justice interests in finality and comity.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be reversed.

Dated: July 24, 1992

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

WARD A. CAMPBELL
Deputy Attorney General

*MARK L. KROTOSKI
Special Assistant Attorney General

1515 K Street, Suite 603
Sacramento, CA 95814
(916) 324-5497

Attorneys for Amici
*Counsel of Record

(6)

No. 91-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. L. LOCKHART,
Director, Arkansas Department of Corrections,
Petitioner,

v.

BOBBY RAY FRETWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE OF THE STATE OF FLORIDA; VOLUNTEER LAWYERS RESOURCE CENTER FOR THE STATE OF FLORIDA; MISSOURI CAPITAL PUNISHMENT RESOURCE CENTER; OKLAHOMA CAPITAL PUNISHMENT POSTCONVICTION UNIT, INDIGENT DEFENSE SYSTEM; NORTH CAROLINA RESOURCE CENTER, OFFICE OF THE APPELLATE PUBLIC DEFENDER; PUBLIC DEFENDER OF INDIANA, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

MICHAEL MELLO *
Vermont Law School
South Royalton, VT 05068
(802) 763-8303

MARTIN MCCLAIN
Chief Assistant
Office of the Capital
Collateral Representative of
the State of Florida
1533 S. Monroe Street
Tallahassee, FL 32301
(904) 487-4376

* Counsel of Record

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

This brief is filed with the consent of both parties.

Amici are public defense organizations and death penalty resource centers in states with capital punishment. Some *amici*, such as the Office of the Capital Collateral

Representative of the State of Florida (CCR), provide direct representation to indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in both the state and federal courts. *See* Fla. Stat. § 27.702 (1991) (CCR enabling statute). Other *amici*, such as the Missouri Capital Punishment Resource Center, provide litigation support and expertise to court-appointed and pro bono counsel in capital cases.

This brief addresses the applicability of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), to "weighing states" such as Arkansas which do not narrow the class of death-eligible cases at the guilt phase of bifurcated capital trials. *Amici* have had much experience working under capital punishment statutory schemes similar to Arkansas'.

SUMMARY OF ARGUMENT

The state presents the question before this Court as one of ineffective assistance of trial counsel. The state relics upon *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and its precursors to support Mr. Fretwell's conviction and condemnation for felony murder, arguing that counsel was effective because he anticipated *Lowenfield* and its implications for Arkansas. An important subsidiary question presented is whether the rules laid down in *Lowenfield* for Louisiana govern in Arkansas.

Lowenfield v. Phelps approved one state's modern death penalty scheme: Louisiana's statute, which narrowed the death-eligible class at the guilt stage by adopting a form of heightened first degree murder. Arkansas has a quite different modern system for deciding who dies. Arkansas retained its traditional definitions of first degree murder (premeditated murder and felony murder) and performed the narrowing function at the sentencing stage by using aggravating circumstances—one of which is pecuniary gain.

Bobby Ray Fretwell was convicted of felony murder, based on the predicate felony of robbery. An essential

element of robbery was the intent to obtain money. He was then sentenced to die, based on a lone aggravating circumstance—pecuniary gain, an essential element of the felony murder conviction.

Application of *Lowenfield* to Arkansas' capital sentencing scheme ignores two critical and independent differences between the statutes of Arkansas and Louisiana. First, unlike the Louisiana statute considered in *Lowenfield*, Arkansas does not meaningfully narrow the class of death-eligible cases at the guilt phase. In Arkansas, the state may not use an element of the capital crime as an aggravating circumstance. *E.g., State v. Middlebrooks*, No. 01-5-01-9102-CR-00008 (Tenn. Sept. 8, 1992) (copy available from counsel), slip op. at 51-67; *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). Second, again unlike the Louisiana statute at issue in *Lowenfield*, Arkansas is a weighing state. The distinction between weighing and nonweighing statutes matters for purposes of *Lowenfield*. *Stringer v. Black*, 112 S. Ct. 1130, 1136-38 (1992).

Should the Court agree with *amici* that *Lowenfield* does not govern weighing states like Arkansas, the merit of Mr. Fretwell's ineffective assistance of counsel claim becomes clear and powerful. Without any conceivable competing strategy, counsel failed to argue compelling authority that would have rendered his client ineligible for death. This is a classic example of the kind of global attorney error that, standing alone, establishes a prejudicial violation of the sixth amendment under *Kimmelman v. Morrison*, 477 U.S. 365 (1986). *E.g., Curry v. Zant*, 371 S.E.2d 647 (Ga 1988) It is difficult to conceive of a trial lawyer's legitimate reason for not raising an objection which, if granted, would have rendered her client non-death-eligible;[1] imagine, for example, a defense law-

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[1] Invalidation of the sole aggravating factor in his case would render Mr. Fretwell ineligible for the death penalty. *Cf. Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992) (observing that "sensible

yer in a capital rape case not objecting based on *Coker v. Georgia*, 433 U.S. 584 (1977). In analyzing Mr. Fretwell's ineffectiveness claim, *amici* respectfully ask the Court not to assume, as the eighth circuit assumed in this case, that *Lowenfield* governs capital sentencing schemes materially different from Louisiana's.

ARGUMENT

IN A WEIGHING STATE THAT DOES NOT NARROW THE CLASS OF DEATH-ELIGIBLE CASES AT THE GUILT PHASE OF BIFURCATED CAPITAL TRIALS, SIMPLY REPEATING ELEMENTS OF FELONY MURDER AS AGGRAVATING CIRCUMSTANCES FAILS TO GENUINELY NARROW AND GUIDE SENTENCING DISCRETION.

As framed by the state's certiorari petition, this case presents a question of ineffective assistance of trial counsel: whether Bobby Fretwell was denied the right to effective assistance of counsel at the sentencing phase of his capital case "when his trial counsel failed to make a 'double counting' objection based on the Eighth Circuit's holding, in *Collins v. Lockhart*," 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013 (1985), in "light of the fact that *Collins* had been decided contrary to this Court's joint opinion in *Jurek v. Texas* and *Lowenfield v. Phelps*, and was subsequently overruled by the eighth circuit." Brief for Petitioner, at i (citations omitted).[2]

meaning is given to the term 'innocent of the death penalty' by allowing a showing, in addition to innocence of the capital crime itself, that there was *no aggravating circumstance or that some other condition of eligibility had not been met*") (emphasis added).

[2] A constitutional claim based on *Collins v. Lockhart* was raised on Mr. Fretwell's direct appeal, but the Arkansas Supreme Court held the issue procedurally barred. *Fretwell v. State*, 708 S.W.2d 630, 634 (Ark. 1986). Any procedural default should be forgiven, because invalidation of the lone aggravating circumstance in Mr. Fretwell's case would render him ineligible for, and thus "innocent" of, the death penalty. *Sawyer v. Whitley*, 112 S. Ct. at 2522.

In *Collins*, the eighth circuit had held that Arkansas' use of an aggravating circumstance that duplicates an element of the crime itself violates the eighth amendment. The state argues that *Collins* was wrong when decided, because it was contrary to *Jurek v. Texas*, 428 U.S. 262 (1976), and that *Collins* was effectively overruled by *Lowenfield v. Phelps*.

Arkansas' capital sentencing scheme differs from the systems at issue in *Lowenfield* and *Jurek* in two critical and independent respects: Arkansas does not narrow the death-eligible class at the guilt stage, and Arkansas does require the jury to weigh aggravating against mitigating circumstances at the sentencing stage. Because *Jurek* is important only as a precursor of *Lowenfield*, this brief will focus on *Lowenfield* and on the applicability of *Lowenfield's* analysis to Arkansas.[3]

A. *Lowenfield v. Phelps*

In *Lowenfield v. Phelps*, 484 U.S. 231, 234 (1988), the Court upheld a Louisiana death sentence where the sole aggravating circumstance found by the jury was identical to an element of the capital murder statute. The defendant had been convicted of three counts of first-degree murder, an essential statutory element of which was a finding of his specific intent "to kill or inflict great bodily harm upon more than one person." *Id.* Only this finding at the guilt phase made the murder first-degree, rather

[3] *Lowenfield* addressed the issue of "double counting," and thus is the case most central to the logic of the state's *Collins v. Lockhart* argument. The state's brief emphasizes *Jurek* rather than *Lowenfield*, almost certainly because of the time framing aspects inherent to Mr. Fretwell's ineffective assistance claim. As to the guilt stage narrowing dimension of Mr. Fretwell's case addressed by this *amicus* brief, *Jurek* adds nothing to *Lowenfield's* analysis. *Cf.* Brief for Petitioner, at 56 ("in *Lowenfield* this Court has done nothing more routine than apply *Jurek v. Texas*").

than second-degree.[4] In the sentencing phase, the jury found the aggravating circumstance that the defendant had "knowingly created a risk of death or great bodily harm to more than one person." *Id.*

The Court held that the duplicative nature of the statutory aggravating circumstance did not invalidate the sentence. The majority opinion noted that this particular statutory scheme appropriately narrowed the group of those eligible for the death penalty at the guilt phase, rather than the sentencing phase, and reasoned that the scheme was constitutional so long as this narrowing occurred *somewhere* along the way.

Because Louisiana performed the narrowing function at the crime-definitional phase, and because Louisiana capital sentencers were not directed to weigh aggravating and mitigating circumstances at the sentencing stage, the *Lowenfield* Court permitted Louisiana to use an element of a capital crime as an aggravating circumstance. *Lowenfield* thus reinforced the unexceptional idea, first expressed in *Jurek v. Texas*, that a state legislature *could, if it so chose*, narrow the class of death eligible cases at the guilt phase by sufficiently narrowing its definition of capital murder, and by dispensing with further narrowing at the sentencing stage. The Constitution does not require that narrowing occur at both phases of trial.

B. The Constitutional Minimum for All Capital Punishment Systems: Genuine Narrowing of the Class of Death-Eligible Cases, at Either the Guilt Phase or the Sentencing Phase.

A capital statute that authorized death for all traditional first degree murderers would surely violate the requirements of *Furman v. Georgia*, 408 U.S. 238 (1972). These were the very standardless statutes held unconsti-

[4] Under Louisiana law, aggravating circumstances are used to elevate homicides from second to first degree murder. *Stringer v. Black*, 112 S. Ct. 1130, 1138 (1992).

tutional in *Furman* itself. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1107-1108 (1990). The eighth and fourteenth amendments require more.

For a capital statute to pass constitutional muster, a state must devise "means genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Stringer v. Black*, 112 S. Ct. at 1138 (quoting *Lowenfield v. Phelps*, 484 U.S. at 244-45). The Court required states to adopt procedures that genuinely narrow the sentencer's consideration of the death penalty to a smaller, more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers. Although there is "no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of trial or the guilt phase," *Stringer, id.* (quoting *Lowenfield, id.*), the Constitution demands that it be performed *at some point* in the bifurcated trial process.

The requisite narrowing must be of two sorts: numerical and qualitative. Rosen, *supra*. The former is self explanatory; the latter requires that the members of the narrowed class in fact be the most culpable offenders.

Numerical narrowing is a constitutionally necessary first step under the eighth amendment. *Pully v. Harris*, 465 U.S. 37, 50 (1984) (describing the "constitutionally necessary narrowing function"). "A state first must narrow the class of homicide defendants who are eligible for the death penalty to ensure that even if some materially depraved murderers manage to avoid the death penalty, those chosen will, at least, be among the worst offenders. This [quantitative] narrowing, however, is insufficient by itself to satisfy the Eighth Amendment." *Tennessee v. Middlebrooks*, No. 01-5-01-91-9102-CR-00008 (Tenn. Sept. 8, 1992), slip op. at 56 (citing Rosen, *supra*, at 1108).

A state must not only "genuinely narrow the class of [death-eligible] defendants," but it must do so in a way that "reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).[5] As the Tennessee Supreme Court recently recognized, this qualitative narrowing is as required as numerical narrowing is. A state "must not only genuinely narrow the class of death-eligible defendants, but it must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendants compared to others guilty of murder." *Middlebrooks*, *supra*, slip op. at 58.

A properly applied narrowing device therefore provides a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not," *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980), and must "differentiate this [death penalty] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879. Such a device theoretically supplies a rational penological basis for executing one defendant and not another, and thus gives at least some, albeit incomplete, measure of assurance that a state is applying the death penalty proportionally. "Even if some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers—those whose crimes are particularly serious or for which the death penalty is peculiarly appropriate." *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring).

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[5] The *Zant* decision made clear that this narrowing function was the only constitutionally required role to be played by aggravating circumstances in state sentencing systems which employ aggravating circumstances. However, states may assign a larger role to aggravating circumstances and, where they do so, the eighth amendment may be implicated if arbitrariness is allowed to creep in.

The critical role played by this narrowing requirement is especially significant in light of the discretion which the Court mandates for the capital sentencing body, be it judge or jury. *Middlebrooks*, *supra*, slip op. at 59. Because a capital sentencer now must be allowed appropriate discretion to impose a life sentence based upon any relevant mitigating evidence concerning the character of the defendant or the circumstances of the crime,[6] the sentencer should be restricted to using this discretion on a class of murderers that is demonstrably smaller and more blameworthy than those who commit less aggravated murders under state law.

In applying this constitutional requirement, the Court has analyzed various models and specific statutory schemes. The Court has prohibited states from considering any crime—no matter how narrowly defined—so serious that every person who commits it must be put to death. *E.g.*, *Sumner v. Shuman*, 483 U.S. 66 (1987) (invalidating statute mandating death for life term prisoners who commit murder); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating statute mandating death for first-degree murders defined in the same manner as they are in Mr. Fretwell's case). Yet the Court, mindful of the need to direct and limit the sentencer's discretion, has required capital sentencing statutes to establish predictable standards for the purpose of aiding in the rational selection of who among those convicted of murder should be singled out for the ultimate and irrevocable penalty of death. *Zant*, 462 U.S. at 878.

States have chosen to perform *Furman*'s narrowing function in either of two general ways. A few states, such as Louisiana[7] and Texas, reacted to *Furman* by fine-

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[6] *E.g.*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Lockett v. Ohio*, 438 U.S. 586 (1988).

[7] Leslie Lowenfield's brief traced the history culminating in enactment of Louisiana's modern capital statute. Brief for Petitioner, *Lowenfield v. Phelps*, No. 87-6867, at 41-42 n.25 (O.T. 1987). In 1976,

tuning their first degree murder statutes by requiring the jury at the guilt stage to convict the defendant of a new enhanced category of "capital murder," and then added further aggravating circumstances at the penalty phase. *Middlebrooks*, *supra*, slip op. at 60; Rosen, *supra*, at 1123.

The majority of post-*Furman* states, such as Florida, Georgia, and Arkansas, retained their traditional categories of first degree or malice murder, most obviously premeditated murder and felony murder. Rosen, *supra*, at 1122. These jurisdictions use aggravating circumstances in the penalty hearing to, in effect, establish an enhanced category, "aggravated first degree" or "malice murder." In these states, it is aggravating circumstances that perform the narrowing function demanded by *Furman*. Typically, after a jury finds the defendant guilty of capital or first degree murder, it retests the defendant's liability against a still narrower "super first degree murder" law by deciding whether the offender

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this Court invalidated Louisiana's post-*Furman* mandatory capital punishment statute. *Roberts v. Louisiana*, 428 U.S. 323 (1976). One year later, the Louisiana legislature explicitly amended its definition of *second*-degree murder to include all homicides where the offender has a specific intent to kill but where the aggravating circumstances listed in the capital sentencing portion of the statute were not present. *See* Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana*, 24 LOY. L. REV. 709, 738 (1978). The Louisiana Supreme Court subsequently interpreted this statutory change as an amendment by implication of the state's first-degree murder statute, so as to incorporate the sentencing aggravating circumstances into the definition of *first*-degree murder itself, because second-degree murder excludes such factors. *State v. Payton*, 361 So.2d 866, 870 (La. 1978). The Louisiana legislature then codified this interpretation in 1979. *See* Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 TUL. L. REV. 828, 861 n.108 (1979). Thus, the definition of capital murder in Louisiana provides for the narrowing function to occur at the guilt phase.

exhibited certain aggravating factors. The sentencer then weighs those aggravating factors against any mitigating factors about the crime or the offender and decides whether the defendant shall live or die.

Regardless of where in the bifurcated process the narrowing takes place, that narrowing function must be meaningful. Where aggravating factors are employed, those circumstances must possess genuine directive content; unconstitutionally vague aggravating circumstances do not satisfy the narrowing requirement of *Furman*, for example. *E.g.*, *Espinosa v. Florida*, 112 S. Ct. 2926 (1992) (aggravating circumstance authorizing death if offense was "especially heinous, atrocious or cruel" held vague and so subject to unconstitutional application); *Sochor v. Florida*, 112 S. Ct. 2114 (1992) (same); *Shell v. Mississippi*, 111 S. Ct. 313 (1991) (same); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (same analysis applied to differently worded heinousness aggravating circumstance); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (same); *see generally* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases*, 64 N. CAR. L. REV. 941 (1986).

When aggravating circumstances are used as the class-narrowing device, these circumstances "must [] genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877. In *Gregg v. Georgia*, 428 U.S. 153, 195 (1976), the Court found Georgia's capital sentencing scheme constitutional on its face, in large measure because it provided for a "bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provide with standards to guide its use of the information." These "clear and objective standards," focusing on the specific circumstances of the crime and the character of the offender, are enforced through the requirement that the sentencer "find a *statu-*

tory aggravating circumstance before recommending a sentence of death." *Id.* at 197 (emphasis in original); *see also Zant v. Stephens*, 462 U.S. at 876 ("The approval of Georgia's capital sentencing procedure rested primarily on . . . [the requirement] that the jury . . . find at least one valid statutory aggravating circumstance"). A statutory aggravating circumstance "must satisfy a constitutional standard derived from the principles of *Furman* itself" in guiding the sentencer in the selection of whether one convicted of murder should live or die. *Zant*, 462 U.S. at 876.

Similarly, guilt phase narrowing, when employed, must be genuine. In states following the Louisiana and Texas models, capital murder is defined as "murder plus" some variable distinguishing it from the constitutionally-defined minimum baseline of first degree murder.

No one type of capital sentencing system is required by the Constitution. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). By the same token, as the eighth circuit recognized in *Fretwell v. Lockhart*, 946 F.2d 571, 575 (8th Cir. 1991), the reasoning of *Lowenfield v. Phelps* was grounded in the particulars of the Louisiana statute before the Court in that case. Regardless of whether the requisite narrowing takes place within the definition of capital murder, or whether it occurs by the use of aggravating circumstances, that narrowing of the death-eligible class must occur. And it must occur meaningfully.

C. In a Weighing State Like Arkansas, Where the Death-Eligible Class is Not Meaningfully Narrowed at the Guilt Phase, *Lowenfield v. Phelps* Does Not Govern.

Arkansas' post-*Furman* capital punishment scheme retained the traditional categories of first degree murder, premeditated murder and felony murder. Ark. Code Ann. (Supp. 1991) 5-10-101(a)(1) (Supp. 1991). Further,

the sentencing jury in Arkansas is required to impose the death penalty only if it unanimously finds that "aggravating circumstances *outweight* [*outweigh*] beyond a reasonable doubt all mitigating circumstances." Ark. Code Ann. § 5-4-603(a) (Supp. 1991) (emphasis added). Such weighing is a condition precedent to death sentences in Arkansas.

Either characteristic standing alone sufficiently distinguishes the Arkansas capital statute from the Louisiana statute at issue in *Lowenfield*.

1. *The First* Lowenfield *Difference: Unlike the Louisiana Statute at Issue in* Lowenfield v. Phelps, *Arkansas Does Not Meaningfully Narrow the Class of Death-Eligible Cases at the Guilt Phase.*

Lowenfield v. Phelps makes clear that states *may* choose to perform the narrowing function at the guilt phase, so long as the narrowing is meaningful. Examination of Arkansas' law shows that, unlike Louisiana, it has not done so.

a. *Arkansas' Traditional, Pre-*Furman *Felony Murder Doctrine: No Meaningful Guilt Stage Narrowing of the Death-Eligible Class.*

Arkansas' felony murder statute is typical of those jurisdictions which have not amended their statutes in reaction to *Furman v. Georgia*. The class of first degree murderers remains as before in the pre-*Furman* era; that class is narrowed in the sentencing phase by the mechanism of aggravating circumstances.

A person commits capital murder in Arkansas if "acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting

extreme indifference to the value of human life. . . ." Ark. Stat. Ann. § 41-1501(1)(a) (1977) (presently codified as Ark. Code Ann. § 5-10-101(a)(1) (Supp. 1991))."

"[U]nder the current [Arkansas capital] statute, the narrowing primarily occurs at the penalty phase of the trial." *Johnson v. State*, 823 S.W.2d 800, 805 (Ark. 1992). After quoting Arkansas' current statute, the *Johnson* court reasoned that it "provides for the narrowing in the penalty phase of the trial. The Constitution requires no more than a narrowing of the death-eligible class in the penalty phase of a bifurcated trial." *Id.* (citing *Lowenfield v. Phelps*).[9] The court in *Johnson* also explained its decision in *O'Rourke v. State*, 746 S.W.2d 52 (Ark. 1988), a case decided soon after *Lowenfield* and a case interpreting an earlier, although indistinguishable, version of Arkansas' capital statute. Following a discussion of *Lowenfield*, the *O'Rourke* court concluded that "as was the case with Louisiana's death penalty law which was considered in *Lowenfield*, the duplicative nature of Arkansas' statutory aggravating circumstances did not render appellant's sentencing infirm since the constitutionally-mandated narrowing function was performed at the guilt phase." 746 S.W.2d at 56. The prisoner in *Johnson* cited *O'Rourke* for the proposition that "a narrowing of the death eligible class occurs during the guilt

[8] This is substantially different from Louisiana, where aggravating factors are part of the defintion of murder.

[9] The court's reasoning occurred as part of its rejection of Mr. Johnson's argument that the capital murder statute was facially unconstitutional, because it failed to narrow the class of persons eligible for the penalty of death. The court went on to reject Mr. Johnson's argument that the duplicate use of pecuniary gain as part of the definition of the offense and also as an aggravating circumstance violated the Constitution. Because his conviction was predicated on premeditated murder and not felony murder, Mr. Johnson was held to lack standing to raise the issue. *Johnson*, 823 S.W.2d at 806. Further, the court agreed with the eighth circuit that *Lowenfield v. Phelps* overruled *Collins v. Lockhart*. *See Johnson*, 823 S.W.2d at 806 (citing *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989)).

phase of the trial." *Id.* However, the *Johnson* court stated, "we did so write in *O'Rourke*, but that opinion discussed an earlier version of the statute. We did not discuss the possibility of the narrowing occurring in the penalty phase because we did not have to. But the statute has been changed, and under the current statute, the narrowing occurs primarily at the penalty phase of trial." *Johnson*, 823 S.W.2d at 805.[10] Discussing *Lowenfield*, the court reasoned that the "legislature previously narrowed the class in both ways but, under the 1989 amendment, has broadened the definition of the crime so that *the narrowing now primarily occurs at the penalty phase*." *Johnson, id.* (emphasis added)."[11]

[10] Under Arkansas law, all reckless felony murders satisfy the test for death-eligibility. Arkansas law requires that the defendant possess a specified *mens rea* of at least "extreme indifference to the value of human life." Ark. Stat. Ann. § 5-10-101(a)(1) (Supp. 1991). However, *all* felony murderers potentially meet such a recklessness standard; that is, one who purposely undertakes a dangerous felony that results in a death almost invariably can be found reckless. Therefore, the narrowing device in Arkansas is essentially no different from those in pure felony murder states—*i.e.*, from those jurisdictions that allow the defendant to be sentenced to death solely because the killing took place during an accompanying felony.

Further, *Tison v. Arizona*, 481 U.S. 137, 158 (1987), now places a nationwide threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty. The Tennessee Supreme Court recently reasoned that "all felony murderers" potentially meet a [*Tison*] recklessness standard." *State v. Middlebrooks*, *supra*, slip op. at 62-63. Since after *Tison* "the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully narrow the class of death-eligible defendants." *Middlebrooks, id.* at 63.

Because the absence of reckless indifference immunizes a defendant constitutionally, its presence cannot meaningfully further narrow the class of death-eligible defendants. Satisfying *Tison* cannot alone constitute meaningful narrowing.

[11] The court's reference to the 1989 changes to the Arkansas Code is puzzling, because the recodification alters the statute in no dis-

The Arkansas statute includes traditional, simple felony murder as capital murder in essentially the same fashion as Georgia [12] and Florida.[13] This Court in *Stringer v. Black* noted that *Lowenfield* had been concerned with the Louisiana statutory scheme, where the narrowing occurred at the guilt phase. The *Stringer* opinion was clear that *Lowenfield* would not govern either the Georgia or Florida models: "*Lowenfield*, arising under Louisiana law, is *not applicable here*." *Stringer*, 112 S. Ct. at 1138 (emphasis added). The Court contrasted the Louisiana scheme with the Georgia and Florida schemes, concluding

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cernably relevant way. Mr. Fretwell was convicted and condemned in 1985.

[12] *Gregg v. Georgia*, 428 U.S. at 162 n.4. Ga. Code Ann. § 26-1101 (1972) provided:

> (a) A person commits murder when he unlawfuly and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or imprisonment for life.

[13] *Proffitt v. Florida*, 428 U.S. at 247 n.4. Fla Stat. Ann. § 782.04 (1) (Supp. 1976-77) provided:

> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the preparation of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age of older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

that "[t]he State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error . . . *Lowenfield*['s] relevance to *Godfrey*, which it did not find it necessary to cite, or the line of cases following from *Godfrey*, is slight at best." *Stringer*, 112 S. Ct. at 1138-39.[14]

Mr. Fretwell's case illustrates the perverse operation of Arkansas' capital felony murder scheme. Mr. Fretwell was convicted of felony murder. The underlying felony was robbery. An essential element of robbery was the intent to obtain money. Though instructed on two aggravating circumstances, the jury found only the pecuniary gain factor present.[15] The jury thus sentenced Mr. *Fretwell* to death by finding an element of felony murder as an aggravating circumstance.

Under the State of Arkansas' *Lowenfield* rationale, it could also have statutorily identified as aggravating circumstances: 1) pecuniary gain; 2) in the course of a felony; 3) the victim was threatened with violence; and 4) an unjustified killing occurred. Under such a scenario, all the aggravating circumstances would exist in a felony (robbery) murder. Yet all these aggravating circumstances are "illusory" because they "create[] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be." *Stringer*, 112 S. Ct. at 1139. Certainly, the word "aggravating" in and of itself means that it must be a circumstance which is over and above first degree murder.

In *Stringer* the heinousness aggravating circumstance was held "illusory" because it was unconstitutionally vague. Here the pecuniary gain aggravating circum-

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[14] *Stringer v. Black* thus indicates that the eighth circuit's conclusion that *Collins* was overturned by *Lowenfield* was erroneous. *See infra* § C1b.

[15] The invalidation of the sole aggravating circumstance in a capital case invalidates the death sentence. *Sawyer v. Whitley*, 112 S. Ct. 2514, 2522 (1992) (one is innocent of the death penalty if "there was no aggravating circumstance or [if] some other condition of eligibility has not been met").

stance is illusory because it merely repeated an element of the predicate felony of robbery. It is this illusory nature of the pecuniary gain circumstance that tainted Mr. Fretwell's death sentence with error of constitutional magnitude. The jury weighed a phantom aggravating circumstance in its balance. The unmistakable message sent to the jury was that the pecuniary gain factor was a circumstance that *mattered* in its weighing, when in fact the circumstance added nothing to the felony murder conviction. In this sense the factor should have been treated as weightless, but the jury inevitably "found" it and weighed it nonetheless. This ephemeral aggravating circumstance cast the issue before the jury into a language of false legalism, and the resulting weighing thereby was skewed. *Cf.* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 375-83.

Such bootstrapping upon bootstrapping is not unique to Mr. Fretwell's case, although perhaps few other condemned Arkansas prisoners possess *only* the pecuniary gain aggravating circumstances in their cases. *Every* robbery felony-murder would include, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Arkansas' statute, violates the eighth amendment. An automatic aggravating circumstance is created which fails to meaningfully narrow.

If a defendant was convicted of robbery murder, he would then face mandatory statutory aggravation for pecuniary gain. This is too circular a system to meaningfully differentiate between who should live and who should die. Because an element of the crime was simply recycled as an aggravating factor, there was no "genuine [] narrowing [of] the class of death-eligible." *Stringer v. Black*, 112 S. Ct. at 1138. It additionally was used as weight; a thumb on the death side of the scale. Mr. Fretwell will show at § C2, *infra*, that Arkansas is a weighing state. In a weighing state like Arkansas, use of a duplicative aggravating factor in a "weighing process invalidates the sentence." *Id.* at 1140.

b. Lowenfield v. Phelps, *Felony Murder, and Murder for Pecuniary Gain in Arkansas.*

This case illustrates why commentators and at least three state supreme courts have criticized the felony murder rule as a bootstrapping device that makes defendants artificially death-eligible.[16] As the Tennessee Supreme Court put it only ten days ago, the doctrine "vaults an offense into the class of murders without the malice finding usually required, and then, still without any culpability finding, elevates what otherwise might not be a murder to first-degere murder." *Middlebrooks, supra*, slip op. at 62 (citing Rosen, *supra*, at 1127). In addition, in cases like Mr. Fretwell's, "a third level of bootstrapping arises as the felony murder defendant is moved up into the supposedly restricted class of defendants eligible for death." *Id.*

Problems of coherently narrowing the death-eligible class become especially complex in felony murder cases, as the felony murder rule disrupts the usual pattern of individualized scrutiny as well as all meaningful narrowing. The felony murder doctrine has the potential to equate any participant in the underlying felony with the cold-blooded deliberate killer no matter how unforeseeable the death or how attenuated that defendant's participation in the felony or the events leading to the death. Rosen, *supra*. In Justice O'Connor's words, felony murder is not limited to murder "as it is ordinarily envisioned." *Enmund v. Florida*, 458 U.S. 782, 812 (1982) (O'Connor, J., dissenting). In contrast to the winnowing out of the least culpable offenders through the application of the malice and premeditation deliberation standards of non-felony murder homicide law, the felony murder rule

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[16] *E.g.*, Finkel, *Capital Felony Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819 (1980); Rosen, *supra*; Roth & Sundby, *The Felony-Murder Rule: A Doctrine at a Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985); Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356 (1978).

thrusts an entire undifferentiated mass of defendants into the category of the supposedly worst murderers eligible for the death penalty. Some of these defendants indeed may be among the most culpable offenders—for example, the cold-blooded executioner of a store clerk during a robbery—but many are not. Rosen, *supra*. It is precisely this lack of distinctions that requires that the most individualized attention be paid to these death-eligible felony murder defendants.

It is questionable whether the felony murder rule itself, or its subsidiary "pecuniary gain" aggravating circumstance, meaningfully narrow the death-eligible class of cases. With the notable exception of *State v. Middlebrooks*, *supra*, slip op. at 51-63, courts rarely have addressed in any detail use of the felony murder rule as a narrowing device, either alone or in conjunction with a broad pecuniary gain aggravating circumstance.

Arkansas broadly construes its pecuniary gain aggravating circumstance to include all felony murder cases where an underlying motive for monetary gain exists, including all robbery murders and most burglary murders. E.g., *Miller v. State*, 605 S.W.2d 430 (Ark. 1980) (pecuniary gain aggravating circumstance "not limited to a killing for hire, but is also clearly applicable to a murder committed during a robbery") (interpreting Ark. Code Ann. § 5-4-604(6) (Supp. 1991); *Woodard v. State*, 553 S.W. 2d 259, 265 (Ark. 1977) (en banc). Most Arkansas felony murderers are automatically death-eligible without any further narrowing required, because most felony murders occur during robberies or other crimes committed for monetary gain.

As one commentator has written of the pecuniary gain circumstance generally:

> [I]f the quality of the narrowing accomplished by a pecuniary gain narrowing device is perverse, the quality produced by a broad pecuniary gain narrowing device is doubly perverse. Like a felony murder narrowing device, a broad pecuniary gain narrowing device excludes most cold-blooded killers while simultaneously making unintentional killers and accomplices with varying degrees of culpability death-eligible. This represents the first level of narrowing. As with the pure felony narrowing device, a broad pecuniary gain narrowing device thus fails to pass constitutional muster because it does not identify those defendants more deserving of the death penalty as compared with other first degree murder defendants. A broad pecuniary gain narrowing device, however, goes one step further than the felony culpable defendants in the universe of felony murderers for imposition of the death penalty.
>
> In addition to excluding most cold-blooded killers, a broad pecuniary gain narrowing device excludes defendants who kill during the course of certain felonies. Aside from robbery and burglary, the most common of these predicate felonies for first-degree felony murder are kidnapping, arson, rape, and sexual assault. Yet the fact that the victim's death occurred during the commission of any of these felonies should provide substantially more reason to impose a greater sentence than the fact that the defendant's motive was to obtain money or property.
>
> The terror suffered by the kidnap victim, the widespread danger to innocent lives and property caused by the arsonist, and the suffering and bodily violation endured by victims of sexual assault and rape—a defendant in all of these cases causes more harm and is demonstrably more culpable than the defendant whose underlying crime arises from a desire for gain. Of course, varying degrees of harm and culpability exist in all of these crimes, but, as a whole, it seems impossible to argue that one who kills out of a need for money is more deserving, or even equally deserving of a death penalty as compared with a rapist or a kidnapper who kills. Yet, along with the cold-blooded non-felony killers, these defendants are excluded by a broad pecuniary gain aggravating circumstance.

Rosen, *supra*, at 1131-34 (citations omitted).

Courts, both pre- and post-*Lowenfield*, have dealt with defendants facing death determinations after conviction of felony murder. The Supreme Court of North Carolina and the eighth circuit were troubled that when the penalty trial begins, defendants have no way of disproving the aggravating circumstance that the murder was committed during the course of an enumerated felony. *See State v. Cherry*, 298 N.C. 86, 257 E.E.2d 551 (1979); *Collins v. Lockhart*, 754 F.2d 258, 263-64 (8th Cir. 1985). *Cherry* held that it would be unfair for the state to get a "bonus" out of the proof of a robbery, so that the defendant automatically enters the penalty phase with one strike against him.

Similarly, in *Collins* the eighth circuit held prior to *Lowenfield* that Arkansas' "use of an aggravating circumstance that duplicates an element of [the] crime itself is a violation of the Eighth Amendment." *Id.* at 264. The court could "see no escape from the conclusion that an aggravating circumstance which merely repeats any elements of the underlying crime cannot perform this narrowing function. Every robber-murderer has acted for pecuniary gain." *Id.* A jury which has "found robbery murder cannot rationally avoid also finding pecuniary gain. Therefore the pecuniary-gain aggravating circumstance cannot be a factor that distinguishes some robber-murderers from others." *Id.*

Following this Court's decision in *Lowenfield v. Phelps*, the eighth circuit abandoned *Collins*. In *Perry v. Lockhart*, 871 F.2d 1384, 1992-93 (8th Cir. 1989), the court concluded that "*Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*." *Accord Johnson v. State*, 823 S.W.2d 800, 806 (Ark. 1992).

The eighth circuit "acted prematurely" in *Perry*. Rosen, *supra*, at 1135. To the extent that the reasoning of *Collins* assumed that narrowing must occur at the sentencing stage, *Lowenfield* plainly did overrule *Collins*. But *Lowenfield* did *not* validate the use of felony murder, or pecuniary gain, as a meaningful narrowing device. Those issues were not presented in *Lowenfield*, because in *Lowenfield*, there *was* a genuine narrowing—the defendant was convicted under a section of the Louisiana capital statute that provided for death-eligibility only for defendants who intentionally killed two or more people.

When states do not meaningfully narrow the class at the guilt phase—as, *amici* has shown, Arkansas does not—the logic of *Lowenfield* does not apply. The state supreme courts of Wyoming and Tennessee have so held in cases decided subsequently to *Lowenfield*.

In *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991), the Wyoming Supreme Court held that the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violates the eighth amendment. In *Engberg*, "the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain." *Id.* at 89. As a result, "the underlying robbery was used not once but *three* times to convict and then enhance the seriousness of Engberg's crime to a death sentence. *All* felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position that the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the *Furman/Gregg* narrowing requirement." *Id.* (emphasis in original).

The Wyoming Supreme Court reasoned that "when an element of felony murder is itself listed as an aggravating circumstance, the requirement in [the statute] that at least one 'aggravating circumstance' be found for a death sentence becomes meaningless." *Id.* at 90. The

court approved of *Black's Law Dictionary*'s definition of "aggravation" as " 'any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime or tort itself*'." (emphasis in original).

Most recently, on September 8, 1992, the Tennessee Supreme Court followed North Carolina in *Cherry* pre-*Lowenfield* and Wyoming in *Engberg* post-*Lowenfield*. The Tennessee court held that although felony murder continues to be a death-eligible offense, a finding of an aggravating circumstance *other than* the felony murder aggravating circumstance is necessary to support death as a penalty for the crime. *State v. Middlebrooks*, *supra*, slip op. at 51-67. After tracing the modern history of the capital felony murder doctrine, the court concluded that "in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when a defendant is convicted of first-degree murder solely on the basis of felony murder, the [felony murder] aggravating circumstance . . . does not narrow the class of death-eligible murderers under the Eighth Amendment . . . because it duplicates elements of the offense." *Id.* at 66.

For this reason the Tennessee Supreme Court held, as had the Wyoming Supreme Court before it, that *Lowenfield* does not govern its statutory scheme. The same reasoning applies in Arkansas, for it too is a state in which meaningful narrowing does not occur at the guilt phase. As *Amici* will show in the following subsection, *Lowenfield* does not govern Arkansas for a second, independent reason: Arkansas is a weighing state.

2. *The Second* Lowenfield *Difference: Unlike the Louisiana Statute at Issue in* Lowenfield v. Phelps, *Arkansas is a Weighing State.*

Arkansas' capital statute requires the sentencer to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. The Louisiana statute at issue in *Lowenfield* did not. As *Stringer v. Black*, 112 S. Ct. 1130 (1992) demonstrates, the difference matters for purposes of the rule of *Lowenfield*.

Arkansas is a weighing state. Arkansas' capital statute provides that the jury "shall impose a sentence of death" if it unanimously finds "that aggravating circumstances exist beyond a reasonable doubt" *and* that "aggravating circumstances *outweight* [*outweigh*] beyond a reasonable doubt all mitigating circumstances" *and* that "aggravating circumstances justify a sentence of death beyond a reasonable doubt." Ark. Code Ann. § 5-4-603(a) (Supp. 1991) (emphasis added).

Interpretive caselaw reinforces the idea that Arkansas is a weighing state. The Arkansas Supreme Court explained in *Giles v. State*, 549 S.W.2d 479, 485 (Ark. 1977), that the "weighing process is not simply a matter of counting the number of aggravating and mitigating circumstances and striking a balance." Citing two Florida cases, the *Giles* court observed that the sentencing decision is "a reasoned judgment to be exercised in the light of the totality of the circumstances. The sentencing authority does not act as a computer, but exercises a reasonable and controlled discretion." *Id.*; *see also Woodward v. Sargent*, 806 F.2d 153, 157 (8th Cir. 1986); *Hayes v. Lockhart*, 852 F.2d 339 (8th Cir. 1988).

The Arkansas Supreme Court in *Giles* cited two Florida Supreme Court opinions in support of its interpretation of Arkansas' weighing statute. *Giles*, 549 S.W.2d at 485 (citing *State v. Dixon*, 283 So.2d 1 (Fla. 1973) and *Alvord v. State*, 322 So.2d 533 (Fla. 1975)). The cita-

tions to *Dixon* and *Alvord* are significant, because this Court treats Florida as a paradigmatic weighing state. In Florida, aggravating circumstances are used to both narrow the class of death-eligible and to guide the exercise of sentencing discretion in a consistent and predictable fashion. *Sochor v. Florida*, 112 S. Ct. 2114, 2119 (1992).

The identity between the statutes of Arkansas and Florida is important, because this Court has used Florida as a vehicle for exploring the constitutional significance of weighing. In *Stringer v. Black*, 112 S. Ct. 1130 (1992), the Court explained in dicta that the Florida capital sentencing statute, like the Mississippi statute before the Court in *Stringer*, requires the sentencer to weigh aggravating factors against mitigating factors in determining whether to impose life or death.

The *Stringer* Court underscored the "critical importance" of the distinction between weighing states and nonweighing states in assessing the effect of a sentencer's consideration of an invalid aggravating factor:

> In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. But when the sentencing body in a weighing state is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received

> an individualized sentence. This clear principle emerges . . . from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing.

Id. at 1338.

The Court in *Stringer* stressed that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Id.* at 1139. Use of an aggravating factor "of vague or imprecise content" has a substantial impact upon capital sentencers who weigh aggravating and mitigating factors. *Id.*; *see also Espinosa v. Florida*, 112 S. Ct. 2926 (1992) ("if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances"). So does the use of an aggravating circumstance that repeats an element of the conviction.

The *Stringer* Court explained that the "principal difference between the sentencing schemes in Georgia and Mississippi is that Mississippi is what we have termed a 'weighing' State, while Georgia is not." *Stringer*, 112 S. Ct. at 1137. Under Mississippi law, after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, "it must weigh the aggravating factor or factors against the mitigating evidence. By contrast, in Georgia the jury "must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case." *Id.*

That Mississippi is a weighing state gave "emphasis to the requirement that aggravating factors be defined with some degree of precision." *Id.* at 1136. The Court

further noted that because Mississippi had adopted a weighing scheme patterned after Florida's statute (which was approved in *Proffitt v. Florida*, 428 U.S. 242 (1976)) decisions involving Florida capital cases were most relevant.[17] Because Arkansas likewise is a weighing state, this Court's decisions involving Florida cases are equally relevant.

Most significantly, *Stringer* discussed *Lowenfield*'s inapplicability to weighing states by comparing the non-weighing Louisiana statute at issue in *Lowenfield* with the Mississippi weighing statute at issue in *Stringer*. The Court noted that in Louisiana "a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria." *Stringer*, 112 S. Ct. at 1138 (citing *Lowenfield*, 484 U.S. at 242) (quoting La. Rev. Stat. Ann. § 14:30A (West 1986)). After determining that a defendant is guilty of first-degree murder, a Louisiana jury "next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine

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[17] Caselaw from totality-of-the-circumstances states, like Georgia, is applicable to weighing states, like Mississippi and Florida, because aggravating circumstances, under both models, perform the narrowing function. *Maynard v. Cartwright*; *Stringer v. Black*. Where the models warrant different treatment is in the analysis conducted of the consideration of an invalid aggravating circumstance. In weighing states, harmless error analysis must consider that an invalid aggravating circumstance has a second role in the sentencer's decisionmaking. As a result, as explained in *Stringer*, the harmless error analysis is different.

For purposes of Mr. Fretwell's case, this distinction does not matter. Where there is only one aggravating circumstance, both models require a reversal where that one circumstance was invalid. *Sawyer v. Whitley*, 112 S. Ct. at 2522.

whether the death penalty is appropriate." *Stringer*, 112 S. Ct. at 1138.[18]

Unlike the Mississippi sentencing process before the Court in *Stringer* or the Arkansas procedure before the Court here, in Louisiana the "jury is not required to weigh aggravating against mitigating factors." *Id.* at 1138. According to *Stringer*, the *Lowenfield* Court "went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase. We also contrasted the Louisiana scheme with the Georgia and Florida schemes." *Stringer*, 112 S. Ct. at 1138 (discussing *Lowenfield*).

After reiterating *Lowenfield*'s distinction between weighing and non-weighing statutes, the *Stringer* Court concluded that "[t]he state's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court if an invalid aggravating factor is relied upon." 112 S. Ct. at 1138.

Thus, Arkansas is a weighing state, and *Lowenfield* does not apply to weighing states.

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[18] *See* La. Code Crim. Proc. Ann., art. 905.3 (West 1984 & 1991 Supp.) (although jury must "consider" any mitigating circumstances, it is not required to weigh or balance the aggravating against the mitigating factors by any statutory standards; so long as a Louisiana jury finds that a single aggravating circumstance exists, it can sentence the defendant to death regardless of the presence of any mitigating factors); *see Flowers v. State*, 441 So.2d 707 (La. 1983) (citing *State v. Welcome*, 458 So.2d 1235 (La. 1983)) (holding that there is no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating); *but see State v. Lloyd*, 489 So.2d 898 (La. 1986) (some amount of jury weighing is implicit in the requirement that a jury "consider" mitigating circumstances).

CONCLUSION

Lowenfield v. Phelps does not govern Arkansas' capital sentencing scheme for two independent reasons. Arkansas does not narrow the death-eligible class at the guilt stage. Arkansas is a weighing state.

Respectfully submitted,[19]

MICHAEL MELLO *
Vermont Law School
South Royalton, VT 05068
(802) 763-8303

MARTIN MCCLAIN
Chief Assistant
Office of the Capital
Collateral Representative of
the State of Florida
1533 S. Monroe Street
Tallahassee, FL 32301
(904) 487-4376

* Counsel of Record

Counsel for Amici Curiae

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